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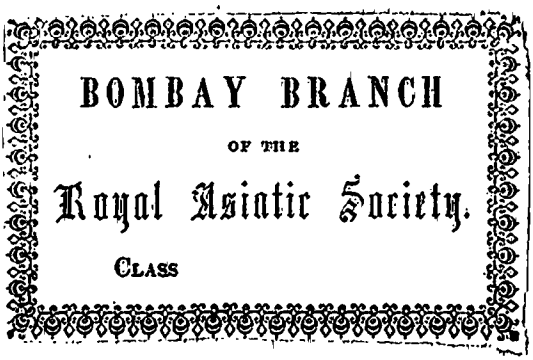

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JUDGMENTS

OF THE JUDICIAL COMMITTEE OF THE

PRIVY COUNCIL

IN CASES OF DOCTRINE AND DISCIPLINE.

&c. &c.

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A COLLECTION OF

THE JUDGMENTS OF THE JUDICIAL COMMITTEE

OF THE PRIVY COUNCIL

IN

ECCLESIASTICAL CASES

RELATING TO

DOCTRINE AND DISCIPLINE:

WITH A PREFACE BY THE

LORD BISHOP OF LONDON,

AND

78770

An Historical Introduction.

EDITED

(UNDER THE DIRECTION OF THE LORD BISHOP OF LONDON)

BY

THE HON. GEORGE C. BRODRICK,

Barrister-at-Law and Fellow of Merton College,

AND

THE REV. WILLIAM H. FREMANTLE,

Chaplain to the Bishop of London, and late Fellow of All Souls' College.

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PREFACE.

THE object of this publication is to bring before the Church, in an accessible form, the series of those Judgments which the Final Court of Appeal from the Ecclesiastical tribunals in England has pronounced in causes relating to doctrine and discipline since the Court assumed its present constitution. It is well that Churchmen should know, for the practical guidance of their own conduct, how the law under which they live is administered. Also, as it is the undoubted right of Englishmen to form an opinion respecting the institutions of their country, it is well that they should be enabled to examine this Court and its proceedings with their own eyes. If there be anything faulty in the Court, let its faults be remedied. But let those who desire to improve it make themselves quite sure that they know, in the first place, both what the Court is, and what it does. The knowledge generally possessed on this subject at present is vague, and the sources from which accurate information can be attained are little understood.

The questions involved in the constitution of such a Court are some of the most difficult with which statesmen have to deal. Obviously the Court is invested with great dignity and wide-spread influence. Not only does it pronounce judgment in causes relating to the highest of all interests, but it reviews decisions given in the name and under the authority—if not in the actual person—of those whose dignity amongst subjects is second to none in the realm. When Tenison, as Archbishop of Canterbury, summoned his comprovincial Bishops

to sit with him in judgment on one of their own order (Watson, Bishop of St. David's), it was to the Court of Delegates, that is, the Sovereign acting in Chancery, that the accused Bishop appealed, and by this Court was the case decided.[1] The same paramount jurisdiction is now exercised by the Queen in Council under an Act of the last reign. According to the Constitution, there lies no further appeal from a Court so directly representing the Sovereign to any body in Church or State: not to the House of Lords as to the temporal effects of the Judgment; not to any of the several Convocations of the Church. Indeed, the Judges, who in Whiston's case were of opinion that the Convocation of Canterbury might be a Court for trying heresy, conceded this on the distinct understanding that an appeal would lie from Convocation to the King.[2] The only way in which, in former times, decisions of the Court of Appeal could constitutionally be set aside was through the Sovereign, by the advice of the Lord Chancellor, issuing a Commission of Review;[3] and, since the last changes in the Court, this has become impossible. Proposals, then, as to the remodelling of this Court raise questions of the gravest moment, if we look only to the importance of its functions.

Now such a Court may have assumed its distinctive form in virtue of the original contract according to which the relations of Church and State were settled, either in their first union or after some momentous political or ecclesiastical revolution: or it may have grown to its existing development in the course of years through changes sanctioned by the distinct legislation or the acquiescence of the two contracting bodies.

The opinion is widely spread, that, when the power of the Crown as exercised through the Court of Delegates was transferred, first to the Privy Council in 1832, and, secondly, to the Judicial Committee of that body in 1833, amid the variety of causes, testamentary and the like, coming before that Court,

[1] Cf. Appendix, p. 337, and also *vide* Burnet, O. T. vol. iv. p. 481.

[2] Cf. Appendix, p. 323.

[3] *Vide* Special Report of Commissioners on Ecclesiastical Courts. 1831. Page 6. Also the Historical Introduction to this work, p. lxi.

there was no thought of causes ecclesiastical in the higher and most restricted sense, or, as it is more proper to call them, causes spiritual. On the other hand, it must be allowed to be strange if such causes were overlooked in the Act of 1833, seeing that both that Act and the previous Act of 1832, which it amended, were founded on two reports of a Commission, on which Archbishop Howley and Bishop Blomfield, with other Bishops, sat, and that the latter of these two reports, presented in February, 1832, devotes five folio pages to a minute consideration of the mode of dealing with the offences of the clergy, and specifies "advancing doctrines not conformable to the Articles of the Church" amongst such offences;[1] while with regard to the modification of the Judicial Committee of the Privy Council as the Court of Appeal, which took place in 1840, this was effected by that Church Discipline Act which, from first to last, deals with spiritual causes and none other.

But, in truth, if in its constitution such a Court contravenes no great principle, religious, ecclesiastical, or political, and if it does its work well, men now-a-days will not be more scrupulous in searching into its origin and growth than they are in tracing out the antiquarian questions connected with other Courts of justice; while on the other hand, if any Court in Church or State works ill, no care in its original formation, nor well-adjusted symmetry of theoretical adherence to great principles, will save it from rough criticism and reform, if not abolition. Probably this Court, like others in the Church or realm, will practically be praised or blamed according to the way in which it discharges its high functions, and the good or evil which results from its judicial action. Hence the propriety of a calm review of what it has actually done.

It is, however, granted that, besides the inquiry into its usefulness, or the reverse, tested by practical results, there must be other intricate points connected with the constitution of such a Court which ought not to be overlooked by

[1] *Vide* as above, Reports of Commissioners on Ecclesiastical Courts, reprinted, 1855. Compare p. 13 with pp. 55 to 61.

those who entertain any project for altering it. Some of these it is now proposed to notice in this short preface.

At the time of the Reformation the difficulties which must always beset the constitution of a Court of Final Appeal for causes ecclesiastical in a national established Church, were, no doubt, keenly felt, and they recur in their full force whensoever men turn their minds to the question whether they ought to seek any changes in such a Court.

On the questions which thus naturally arise, conflicting opinions have of late years been expressed by persons of very high authority both in Church and State. Of course this work does not aspire to settle these questions; but it seeks to supply information indispensable for their settlement. I do not wish in this preface to conceal in what direction my own feelings and conclusions tend in reference to these questions; but still I desire, as far as possible, to reserve my final opinion, in order that, if any definite proposal for the alteration of the Court be brought before the Legislature, I may be able to examine it on its own merits, impartially and unpledged. I have, however, thought it very important, that, in indicating the following points as entering necessarily into any complete discussion of the questions at issue, I should give especial prominence, under each head, to that view which would appear to have been least considered in recent publications, and which is certainly entertained by a large body of attached members of the Church.

I. The idea of a national Church, remaining indeed still a member of the great Catholic Church of Christ in virtue of its adherence to the one Faith, but still independently managing its own affairs, and deciding within itself all its own cases of discipline, had been well-nigh lost in times of Papal encroachment. The problem which the English Reformers had to solve was, how to break away from the dominion of a foreign tyranny and assert independence for English Churchmen, while they still maintained a firm bond of internal unity both in ecclesiastical legislation and in ecclesiastical judicature. There was danger lest, when the forced and unnatural chain forged by Rome was shivered, the Church might resolve itself into its primitive elements, and all out-

ward unity be lost—lest each Diocese, if not each congregation, or insignificant aggregate of congregations, might set up a claim to make its own laws and try its own causes. Happily the English Church in its ancient constitution was not left thus disunited. Besides its anciently recognised legitimate subordination, in many important matters, to the one Chief of the State, it had two great Archiepiscopal centres round which its several Dioceses might revolve. If the power of the Western Patriarch was renounced to save the Church from his usurpations, and from the fatal errors in doctrine and practice which his usurped power fostered, English Christians could still rally round the King and their Metropolitans.

It has been maintained, that as each Archbishop could, under certain restrictions, summon a Convocation of his own Province for legislation, so the experiment was tried for one year of allowing each to hold in his Provincial Court an irresponsible power of judicature without further appeal.[1] But, if this expedient would have avoided the utter disunion which would have followed from acknowledging the independence of separate Dioceses, it still would not have secured union in the national Church as a whole. There were two Archbishops in England, each with his own Province independent of his brother Metropolitan. In Ireland there were four Archbishops. The Archbishop of Canterbury is not Patriarch over the others. We may judge to what confusion this expedient would have led as a precedent in the Church generally, if we suppose it applied to other countries, where there are many Archbishops. In France there are at present eighteen. Obviously the national unity could not be guarded by leaving each Archbishop irresponsible; hence it is scarcely probable that this arrangement was ever tried, even as a temporary expedient for one year.[2] During that one year appeals to Rome were not forbidden except in matrimonial and testamentary causes, and questions of tithes, and the like: that is, spiritual causes would not be finally decided in the Archbishops' Courts. Now those who feel these difficulties insist

[1] 24 Henry VIII. c. 12.

[2] See below, Introd. p. xxxvii. xxxviii.

that the national settlement dates from the Act of the following year,[1] when appeals to Rome in spiritual causes were first forbidden, and the rule of appeal to the King from all the Archbishops' Courts, the principle of which has ever since been maintained, was finally settled.

The problem for the Reformers was, how to secure national Church unity. With the wider union of the various national Churches in the universal Church, they were not for the present occupied. Renouncing the Pope's authority, they looked for the outward manifestation of that wider unity to the representation of various national Churches in general Councils gathered together according to ancient precedent, not without the will of civil rulers. And it is contended, if each national Church, consisting perhaps of several ecclesiastical Provinces, was to be bound together in one outward constitution, this union could not be cemented without a national Head of some kind. The Reformers knew that Metropolitans had become centres for uniting Bishops, and Patriarchs for uniting Metropolitans, not through any institution of Christ, but by the exigencies of the Christian community in past times; and they turned now not unnaturally to the civil ruler of the nation, as affording a ready means whereby the several Dioceses and Provinces in a Christian realm could be welded into one outward body.

At first, there was a tendency in our Reformers to overlook the distinction between the sacred functions of the clergy and the duties of the civil magistrate: both were acknowledged to derive their authority from the same source, and there might be a misconception as if they derived this authority in the same way. But this misunderstanding, against which a protest was afterwards recorded in the thirty-seventh of the XXXIX Articles, produced no lasting practical evil. A marked line was soon recognised, now as of old, as separating clerical functions, and all that purely spiritual authority which Theologians comprehend under "the power of the keys," from temporal dominion.

The Sovereign had always in England been endeavouring

[1] 25 Henry VIII. c. 19.

to make good his right to rule all his own subjects independently of the Pope. It was asserted to be part of the ancient constitution of the realm, that the Sovereign, while he prevented any undue extraneous interference by foreigners with the independent rights of his subjects, should himself wield a guiding and controlling power over all his subjects' claims to exercise either legislative or judicial functions within his dominions; and the Reformation, it is urged, took its stand on this anciently acknowledged principle. Hooker[1] certainly held that there was nothing in the consent of the Church at the Reformation to this arrangement inconsistent with strict ecclesiastical principles. By the union of Church and State, the Courts of the Church had been constituted Courts of the Realm, and their decisions were recognised as carrying with them certain civil as well as spiritual consequences; and the State, in return for this privilege, claimed the right on the part of the

[1] In defending the Royal Supremacy against the attacks of the Puritans, he says:—

"Now besides them which are authorized to judge in several territories, there is required a universal power which reacheth over all, imparting supreme authority of government over all courts, all judges, all causes; the operation of which power is as well to strengthen, maintain, and uphold particular Jurisdictions, which haply might else be of small effect; as also to remedy that which they are not able to help, and to redress that wherein they at any time do otherwise than they ought to do. This power, being sometime in the Bishop of Rome, who, by *sinister practices*, had drawn it *into his hands*, was, for just considerations, by public consent annexed unto the King's royal seat and crown."—Eccl. Pol. lib. viii. p. 542 of the Oxford Ed. of 1836.

Having referred to the proposal of his adversaries to transfer this power to their Synods, he goes on thus:—

"In which case our laws have provided, that if the king's supereminent authority and power shall serve: as namely, when the whole ecclesiastical state, or the principal persons therein, do need visitation and reformation; when, in any part of the Church, errors, schisms, heresies, abuses, offences, contempts, enormities are grown, which men in their several jurisdictions either do not or cannot help: whatsoever any spiritual authority and power (such as legates from the see of Rome did sometimes exercise) hath done, or might heretofore have done, for the remedies of those evils in lawful sort (that is to say, without the violation of the laws of God or nature in the deed done) as much in every degree our laws have fully granted that the king for ever may do, not only by setting ecclesiastical synods on work, that the thing may be their act, and the king their motioner unto it, but by commissioners, few or many, who having the king's letters-patent, may, in the virtue thereof, execute the premises as agents in the right not of their own peculiar and ordinary but of his supereminent power."—*Ibid.*

Civil Ruler to hear appeals from Spiritual Courts. Disclaiming for the supreme civil ruler any other prerogative in the Church than had been given always to all godly princes in Holy Scripture by God himself, the Reformers distinctly contended—and this had been forgotten in bad times—that it was the King's duty to rule all estates and degrees committed to his charge by God, whether they be ecclesiastical or temporal. And, it is urged, when this principle was unreservedly acknowledged, the right of an appeal of some sort to the supreme civil ruler from every ecclesiastical as well as temporal court in the Realm, must have followed as a corollary.

To sum up then, the Courts of the Archbishops were not allowed an irresponsible power. It is contended, that when the supervision of the Pope was repudiated, it was felt that if the Archbishops were permitted to exercise such power, there would be not only, as formerly in Roman Catholic times, one, but several distinct examples of an *imperium in imperio* in the nation. The Church was in intimate alliance with the State, and the State claimed, as a part of this alliance, that, as provincial Synods for legislation were to be restrained by a veto in the civil ruler, so there was to be no ecclesiastical tribunal whose judicial decisions, in which temporal and spiritual interests were necessarily blended, should not be subject to his review. Parties aggrieved in Archbishops' Courts were thus admitted to appeal to the King in Chancery. And these appeals were secured, not for the sake of maintaining the dignity of the civil ruler only: the Church, it is urged, in its purely ecclesiastical character, also received a benefit, by the maintenance of National Church Union, and one great evil which the Reformation threatened was averted. As the restraining power of the Crown prevented provincial Synods from introducing into the national Church the confusion of an independent and varying legislation, so the appeal to the King in Chancery established a national centre in matters relating to ecclesiastical jurisdiction. The Church and nation deliberately acquiesced in this mode of surmounting one great difficulty, and securing a unity of action in matters ecclesiastical, in judicature as well as in legislation,

through the various Dioceses and Provinces of the one national Church.

II. At all times of great organic change, like the Reformation-Age, it is difficult to preserve the distinctive features of the several elements of the Ecclesiastical Commonwealth, and to keep their respective functions properly separate. In times of revolution in the civil Government there is danger lest the legislative and judicial functions of the State come to be confused: and it is so also in the Church. It is one of the worst symptoms of a badly ordered State, when popular assemblies usurp the functions of Courts of Judicature. In the worst tyranny the one tyrant king, in his own person, both makes laws and administers them, and thus his legislative, executive and judicial functions come to be confused—laws are made, not on general principles, but to meet specific cases, and causes are adjudged, not according to what fixed laws enact, but to satisfy some immediate impulse of passion. The same evils disgrace the tyrant democracy. In well-ordered States the power of both making laws and administering them, is never vested in the same person or body corporate. Now the English Reformers were cautious to preserve in the Church this marked separation of legislative and judicial functions. They might have acted like the Scottish Presbyterians, who make their Presbyteries and General Assemblies Courts of Judicature. If diocesan Synods were not abolished in the Reformed English Church, and provincial Synods were clearly recognised, it might have seemed a not unnatural course to refer disputed cases of breach of discipline or unsoundness of doctrine to these assemblies, either in the first instance, or as Courts of Appeal. Perhaps those who complain of the tardiness of our present system in bringing offenders to punishment would have found in such assemblies greater rapidity of process, and surer condemnation of the guilty; but the farsighted men who, under providential guidance, directed such matters for the Church of England at this crisis, thought that such was not the way to maintain the majesty of justice, and they preferred to stand in the old paths, and to draw a marked line between Church legislature and Church judicature. This then was their

mode of solving another difficulty. They maintained the old Bishops' Courts with graduated appeals, not to any meeting of the Church in Synod, but first to the Courts of the several Archbishops, and lastly to the Sovereign, acting through a Court appointed by him for the purpose.

III. There was danger, as the Reformation advanced, and Protestant ideas of the clerical office prevailed, that causes ecclesiastical might come to be decided by men unacquainted with the study of the law, and not trained in those calm habits of practical judicial investigation which are the glory of our English Courts of Justice. In old times, many great lawyers were ecclesiastics. It was one natural consequence of the full development of the Reformation to confine men in Holy Orders far more than formerly to their sacred functions. If, then, the various Courts for the trial of causes ecclesiastical were to be presided over by clergymen, one result of the Reformation would have been to subject the trials in these Courts to Judges who would be considered incompetent as compared with the Judges of the Civil Courts. But this evil, in the course of time, has been avoided, through the machinery preserved at the Reformation. Both in the Diocesan and in the Provincial Courts, the Bishops or Archbishops act through their Chancellors, and care was taken to secure[1] that the Chancellor administering ecclesiastical law, in the name and by the authority of an ecclesiastic, may be a layman.

The system facilitates the presence, and usually the presidency, of competent lawyers in all these Courts. Even if the Bishop or Archbishop be called in rare cases to preside in the Court in person, he has every opportunity for securing the assistance of a learned legal assessor. It is felt that it would be rash in a Bishop to act as Judge without such aid. As the law stands now, the assistance of clergymen is not excluded in certain stages, while a cause mounts up from its first beginning to its final appeal; but the real Judgment, in whatever name delivered, is usually pronounced by professional Judges, learned in the study and trained to the practice of the law. Consistently with this custom it is

[1] Cf. Statute 37 Hen. VIII. c. 17.

urged that, with our English views of the clerical office, a Supreme Court of Appeal would scarcely be held to be a satisfactory tribunal, if the majority of the Judges were in Holy Orders.

An opinion prevails, that, in the statute constituting the Court of Delegates, a proviso was introduced that, when any cause touching the law divine or spiritual learning happened to come in question, then it was to be declared and interpreted by that part of the body politic called the Spirituality. But it is urged in answer, that there is no such clause in this statute.[1] The error seems to have arisen from a strained application of the preamble of the statute of the previous year.[2] In that preamble mention is made of the spirituality and temporality of the Church and Realm of England as independent, each in its own province, of the encroachments of the See of Rome; but, at the same time, both are declared in this very preamble to be subjected to one supreme head and king, having the dignity and Royal estate of the Imperial Crown of this Realm of England. The following facts, also, are insisted on as worthy to be noted:—1. In the second of these statutes a Commission is authorized to revise the Canons of the Church, consisting of sixteen laymen united with sixteen clergymen—2. In the High Commission Court there was a mixture of some laymen with the ecclesiastics—3. An Act was soon passed, as before stated, sanctioning the appointment of laymen to be Judges in Ecclesiastical Courts—4. The records of existing Commissions for Ecclesiastical Appeals, under 25 Henry VIII. c. 19, so far back as we can go, almost invariably exhibit the names of Lay, united with the Clerical Judges.[3] It is urged that it is difficult to understand how these facts are consistent with the view, that it ever was the constitutional practice, since the Reformation, to leave matters of spiritual discipline to be finally determined solely by Clerical Judges. The way in which what appears to be Bishop Gibson's misapprehension of the facts has encouraged this opinion will be stated in the Introduction to this work, where

[1] 25 Henry VIII. c. 19. [2] 24 Henry VIII. c. 12.

[3] Cf. Hist. Introd. pp. xlv—lviii. where full information on this subject is given.

information, hitherto not made public, is given respecting the persons who have served on the Court of Delegates.[1] Hence it is contended that the constitution of our Reformed Church sanctions and advises the appointment of Lay Judges to decide Ecclesiastical causes in conjunction with Ecclesiastics, and many hold that it would be very dangerous for the Church to dispense with this aid of laymen.

IV. But if the due administration of justice requires the presence of trained lawyers on the judgment-seat, it is felt, on the other hand, that, in prosecutions both for violation of discipline and for unsound doctrine, matters must continually arise for discussion in which the acutest lawyer must feel himself unable to decide, unless he has the assistance of a professional theologian: hence it has ever been the custom, in the great appeals of such causes, to unite ecclesiastics with lawyers on the judgment-seat, and the Church Discipline Act has converted this custom into a positive enactment. If lawyers ought to decide, they ought not to decide finally without the help of clergymen; and it has been thought that in no way can this help be so effectually secured as by the actual presence of some clergymen throughout the trial, that they may suggest what occurs to them on each point as it is raised, and give their assistance in the framing and final settlement of the judgment.

V. If this union of the strictly legal and the clerical element is granted to be required, it would be a very grave change to seek such union by submitting the case, as has been sometimes proposed, in two distinct aspects, to two distinct Courts—the Judges hearing the case as lawyers, and referring points in it to some other tribunal of divines. Such an arrangement, it is feared, would have many practical inconveniences. When a man is tried for contravening the Articles and formularies he is accused of violating certain plainly written laws. Are the Judges who try him, it is asked, not to use their own discretion in pronouncing whether or no he has violated these laws? Are they to refer to some other body to say what the written laws mean? Is this other body then, to make what is equivalent to new laws for

[1] Cf. Hist. Introd. pp. xlviii. sqq.

the particular case, or is it simply to direct the attention of the Judges to passages in the old written law, which they had before them when they made the reference? If the former, it is said, they are constituted a perpetual Court of legislation, a sort of General Council in commission, to make new laws according to the Church's emergencies. If the latter, their office is useless, and they cannot give the assistance which legal Judges chiefly require, viz. advice on each point as it casually arises in the sifting of the case, and guidance to the attainment of theological accuracy in the terms in which they clothe their Judgment. It is fully granted that competent theological learning is necessary to aid lawyers in the right application of ecclesiastical laws; but must not such learning, if it is to be of use, be found in the Court itself which pronounces judgment, not in some other anomalous body to which the Supreme Court makes some undefined reference?

If the Judgment be drawn up by a Court of mixed constitution, partly Lay and partly Clerical, and be not the work of the one presiding Judge alone, but, as is the case in all important causes at present, be carefully weighed and corrected, both in expression and in substance, by the whole Court, so that even those Judges or assessors who are dissentient from the conclusion have full opportunity of moulding the general tenor of the document, does not this arrangement afford the best security for such a union of legal authority with theological learning as the proper treatment of these causes requires?

Moreover, the following difficulties occur. Were a real separate clerical tribunal of reference called into existence, would it hear counsel and the arguments of learned theologians, before it gave its rescripts, equivalent to new laws, in each emergency? If so, how long would each case last, and what would be the limit of expense for this new cumbrous machinery?

Again, who is to secure that either the State or the Church would receive these new laws, when a clerical committee had embodied them? The annals of the Star Chamber suggest what consideration Laud and his followers would have

had for the opinions of either of those two great parties, which even Laud's most zealous admirers must admit have, from the Revolution downwards, borne their full share in sustaining, the one the theological literature, the other the spiritual life of England. The example of the Westminster Divines is not more encouraging. Suppose, on the other hand, that the Bishops of the dominant party in the Revolution period had been asked to pronounce their judgment as to the opinions which Laud had patronized fifty years before; or suppose a committee of those whose stagnation of spiritual life and unwise intolerance of all zeal caused the Wesleyan separation, called to say whether the doctrines and practices of the party since commonly called Evangelical, were or were not consistent with the general principles of the Church of England, what in either case would have been the result? We live, indeed, in more tolerant times; but still who that knows anything of the history of Churches can doubt that there must always be danger lest a dominant theological party may be ready, conscientiously enough, to think and to pronounce, that opinions strongly opposed to its own are inconsistent with the general spirit of the Church? Far off be the day when the calmly expressed and wisely guarded statements of the Church's written law, sanctioned by the assent of centuries, can be superseded by the rescripts of any committee.

Many good Churchmen are of opinion that it would be a bad thing if the Church's Provincial Convocations were allowed, even after the calmest and fullest deliberation, to add any further minuteness of statement to the doctrines set forth in the Creeds and Articles, on the reception of which the great compact between Church and State is based. But the most sanguine believer in synods may well feel alarm at the thought of their functions being delegated to a small body of Bishops summoned to give their verdict, on the vague issue, what, on such and such subjects, are the general tenets of the Church. Who shall predict how many new dogmas might not in ten years be propounded by such a body, under the notion of their having been always believed as unexpressed interpretations of the explicit statements of the Church's formularies? What has forced the idolatrous doctrine of the

Immaculate Conception on Roman Catholics but this very power, conceded to a dominant Ultramontane section, of declaring that the Church has always held implicitly what it had never before distinctly promulgated? Much as I regret to differ in this matter from authorities for which I feel the deepest respect, I confess that, as I am at present advised, of all proposed modes of altering our existing Ecclesiastical Courts of Justice, this seems to me to involve the gravest consequences, for I cannot as yet see any solution of the difficulties here suggested. I fear that one great danger which the Reformation settlement, when duly developed in the course of our Church's history, has averted, would recur. It would be hazardous to allow small bodies of either ecclesiastics, or of laymen, in default of precedents for the causes tried by them, virtually to impose fresh articles of faith on men who had received Holy Orders without any thought of such doctrines, and thus continually to be modifying the meaning of these written documents, on the acceptance of which the alliance between Church and State depends.

Whatever views are taken of the above-mentioned, and other similar questions, it is very important to remember that there is a large body of Churchmen who consider the Royal Supremacy as a great blessing providentially guaranteed to the Church of England at the Reformation, and who are therefore very jealous of any projects whereby it may be either directly or indirectly weakened. Of course there is no reason why wisely-considered changes may not now, as in former times, be made in the machinery through which the influence of this Royal Supremacy works. Circumstances might arise when the whole existing compact between Church and State might require to be revised. But wise men in unsettled times are cautious as to organic changes. At this time, as was the case in the agitation after the Gorham decision, many zealous persons desire to rid themselves of a Judgment adverse to their own peculiar views. But certainly no wise statesman nor really loyal Churchman will ever enter on such changes to allay an excitement which maturer consideration may show to be unreasonable. If great changes are required, they must be undertaken very cautiously,

pondered carefully, and at last carried into effect with a wise regard at once to ancient precedents and the fresh emergencies of varying times; and ever with mature reflection on all the difficulties with which reformation has to grapple. The Church of England is the great defence of pure Christianity. To it is committed the most important post in the whole world, in maintaining the ancient faith and yet meeting the ever-varying wants of man's growing intelligence. Let us trust that whatever changes are introduced into its polity, nothing may ever be done to make it more dependent on the temporary agitations of theological parties, to shake its firm hold on the great body of the religious and intelligent people of this nation, or to impede its power of serving Christ effectually by making it less really national than, by God's blessing, it is at this moment.

A. C. LONDON.

FULHAM PALACE,
January 9th, 1865.

ADVERTISEMENT.

THE Reports of Cases, which form the chief part of this volume, have been prepared for the use of the public, and especially of the Clergy, rather than for that of the legal profession. The materials from which they have been compiled are more or less accessible to lawyers, in the authorized reports, and other published documents; and the copious citation of authorities, so essential to a book of reference for the learned, would be inconsistent with the purpose and limits of the present work. The Editors venture to hope, however, that a collection of the Judgments of the Privy Council upon Causes of Doctrine and Discipline, in a concise and convenient form, may not be without its value even to this class of readers, while they confidently believe that it will meet a more general demand for information as to the Court and its judicial action, which has often been felt and expressed. They have, therefore, prefixed to each decision a tolerably full account of the proceedings which led to it, and have added short notes, where they might serve to render the case more intelligible to a person unversed in ecclesiastical law.

In this task they have received most kind and efficient assistance, especially from Mr. E. F. Moore, Reporter to the Judicial Committee of the Privy Council, who has waived his own copyright, and placed the contents of his admirable Reports at the disposal of the Editors.

The Introduction is an attempt to present an historical sketch of the Appellate Jurisdiction in the English Church, and of the modes in which the Sovereign Power of the Realm has exercised its functions at different times as the ultimate resort in Ecclesiastical causes.

The facts which are necessary for the formation of a proper judgment upon the questions relating to the Court of Appeal are mostly to be found in Acts of Parliament and other public instruments; it has therefore seemed best in most cases to embody these in the text, with the addition of such explanatory remarks and quotations as are necessary to connect them and exhibit their meaning.

The writer of the Introductory Essay has again to record his obligations to Mr. E. F. Moore, who has furnished him with valuable information on the Practice of the Judicial Committee of the Privy Council, and on that of the Court of Delegates. He is also deeply indebted to Mr. A. J. Stephens, Q.C., who at great personal inconvenience has given him the benefit of his advice on many points of difficulty; and to Mr. H. C. Rothery, the Registrar of the Court of Admiralty and of the Privy Council as a Court of Appeal in Ecclesiastical cases, who has afforded every facility for the necessary researches into the records of the Court of Delegates, which are in his charge.

INTRODUCTION.

THE Judicial Committee of the Privy Council is popularly known as the Court of Final Appeal in Ecclesiastical Causes. It would be more correct to speak of it as the Court of Final Appeal from Ecclesiastical Courts in England. From the Ecclesiastical Courts of Ireland there is no appeal to the Sovereign in Council, but only to the Sovereign in Chancery: and that jurisdiction is still exercised, in a manner hereafter to be explained, through the ancient "Court of Delegates." Even in England the Privy Council is not the only Court before which Ecclesiastical causes may be brought on appeal. In certain circumstances, the proper mode of proceeding, even in matters involving grave questions of the doctrine of the Church, is by an action in a Court of Common Law, from which an appeal would lie to the House of Lords.

Nor is the constitution of the Judicial Committee itself the same in all Ecclesiastical appeals, for the Legislature has introduced an important distinction between those which arise under a particular Act[1] regulating the proceedings for the

[1] By the Church Discipline Act of 1840 (3 & 4 Vict. c. 86) all prelates of the United Church, who are or may be Privy Councillors, are members of the Judicial Committee for appeals arising under that Act, such as the cases of Archdeacon Denison and Mr. Heath, and those of Dr. Williams and Mr. Wilson. On the other hand, in the cases of Gorham *v.* the Bishop of Exeter, and Liddell *v.* Westerton, there was no Ecclesiastical member of the Privy Council.

The Queen, however, in each of these cases exercised the right given by 3 & 4 Will. IV. c. 41. s. 5, of summoning other Privy Councillors to attend, by requesting the attendance of the Prelates who were Privy Councillors at the meetings of the Committee.

"correction of clerks," and those which involve issues of a different nature.[1]

With these qualifications, however, the Judicial Committee may properly be considered the highest Court of Appeal in matters of doctrine and clerical discipline; and before it, in one or other of its two phases, all the most important causes have been tried during the thirty-two years since its institution.

That Court, which now represents the Royal Supremacy in its Judicial character, owes its origin to the Statutes 2 & 3 Will. IV. c. 92, 3 & 4 Will. IV. c. 41, and 3 & 4 Vict. c. 86. The first of these Statutes vested the appellate jurisdiction in the Sovereign in Council, the second constituted the Judicial

[1] It is stated by Mr. A. J. Stephens, Q.C. (Correspondence with the Archbishop of Armagh, 1855, pp. 22, 49—53,) that "There are, in the United Church of England and Ireland, four Final Courts of Appeal—

"(1) The Judicial Committee, with the Archbishops of Canterbury and York and the Bishop of London as Members, for hearing appeals under the Church Discipline Act.

"(2) The Judicial Committee, without any Bishop or Ecclesiastic, for hearing appeals on *duplex querela*.

"(3) The House of Lords, on appeals, in *quare impedit*, from the Common Law Courts of England and Ireland.

"(4) The Court of Delegates for appeals from the Courts of the Archbishops in Ireland.

"Any given question of doctrine may, under certain circumstances, be brought before any of these Courts."

We may illustrate these four modes of appeal in the following manner: The case of Mr. Gorham, who by a proceeding termed *duplex querela* in the Court of Arches, demanded institution, which had been refused by the Bishop of Exeter, was not a case under the Church Discipline Act. It went, therefore, on appeal before the Judicial Committee of the Privy Council, not including the Bishops.[1] At the same time an action on *quare impedit* was commenced by the Crown as patron in the Court of Queen's Bench. Had this action been pursued, the appeal would have lain to the House of Lords. Had a similar case occurred in Ireland, the appeal in the duplex querela would have gone to the Court of Delegates. And, had Mr. Gorham after institution been accused of false doctrine, the proceedings would have been under the Church Discipline Act, and the appeal would have been to the Judicial Committee of the Privy Council, including the bishops.

An attempt was made in the Church Discipline Bill, introduced by the Lord Chancellor (Lord Cranworth) in 1856, to create an uniform system of appeals. It provided (§ 44) that in case of proceedings by quare impedit, mandamus, or prohibition, which should raise questions of Doctrine, Worship, or Discipline, the matter should be referred to the Court of the Archbishop, whence the appeal should lie to the Queen in Council. The Bill applied to Ireland as well as England.

Committee, the last provided that all Bishops of the United Church who might be Privy Councillors should be Members of the Judicial Committee, for the purpose of hearing Appeals to be brought under that Act.

The appellate jurisdiction which by the first of these Acts is vested in the Sovereign in Council, was, before the passing of that Act, in the year 1832, vested in the Sovereign in Chancery, and was exercised by the so-called High Court of Delegates, which was in reality a special commission appointed on each occasion under the Great Seal.

This mode of appeal was introduced by the Statute 25 Henry VIII. c. 19, which transferred to the King the supreme jurisdiction in all causes which it had before been the custom to carry to the See of Rome. An historical survey of the subject, therefore, must begin with the times before the Reformation.[1]

I.

The supremacy vindicated for the King by the Acts of Henry the 8th did not purport to be, nor was it[2] in fact, a new power. It had been asserted in the most ancient times, and there are records of its practical exercise; so that it may justly be regarded as the revival of the ancient prerogative of the Crown.

The original relation of the English Crown to the See of Rome was singularly independent, and the concessions made

[1] For the sake of clearness, the following division has been adopted:—

1. The facts relating to the conflict of Jurisdiction before the Reformation.
2. The Preamble of the Act of Appeals, 24 Hen. VIII. c. 12, and the policy in Church matters of which it forms a part.
3. The Provisions of the Act of Appeals.
4. The Provisions of the Statute 25 Hen. VIII. c. 19.
5. The state of the highest Ecclesiastical Jurisdiction from Hen. VIII. to the Restoration of Charles II.
6. The Court of Delegates.
7. The Commission on Ecclesiastical Courts of 1830.
8. The Acts of 1832 and 1833, and the Church Discipline Act of 1840.
9. The mode of proceeding in the Judicial Committee.

[2] Coke, speaking of the Acts of Henry VIII. says, "And therefore all Ecclesiastical jurisdiction, though usurped, was now restored to the Crown." See Comyns' Digest. "Prerogative." (D. 11 & 13.) Blackstone speaks of this Act as "declaratory of the ancient law." (B. iii. c. 5.)

to the Church under William the Conqueror himself, and some of his more pliable successors, were contrary to the spirit of our ancient Common Law.

"In the early ages," says Mr. A. J. Stephens,[1] "both Saxon and Norman, all ecclesiastical affairs of chief importance were decided by the Crown, acting with the advice of the highest ecclesiastical and civil personages of the realm. The charter of William the Conqueror, which separated the Court of the Bishop from the Court of the Hundred, previously held together as one court, was made by the King 'Communi concilio et concilio archiepiscoporum et episcoporum et abbatum et omnium principum regni mei.' And this great council remained the same, although the subordinate lay and ecclesiastical jurisdictions were separated.[2]

"The case of the Bishop of Chichester and Battle Abbey, A.D. 1157, affords an instance of an appeal to this tribunal. The Bishop in Synod decided that Battle Abbey was subject to the Bishop's jurisdiction. The Abbot appealed to the King in Council, who reversed the Bishop's decision: the Bishop was obliged to submit, and to acknowledge the supremacy of the Crown" (10 Labbe and Cossart, 1776).[3]

[1] Correspondence with Abp. of Armagh. 13.

[2] See also the account of the severance of the Ecclesiastical and Civil Courts in the time of William the Conqueror, in Reeve's Hist. of English Law, i. 62—64, and Comyns' Digest. "Prerogative" (D. 9). Mr. Coote insists that this so-called Charter was "a statute of the Norman Parliament." He quotes the words of it, which prohibit the Bishops from holding their Courts in the Hundred in matters relating to the "regimen animarum," and order that the accused person "non secundum hundrettum, sed secundum canones et Episcopales leges rectum Deo et Episcopo suo faciat." "This," says Mr. Coote, "completely overturned the English Common Law," and assimilated our law to that of the Continent. Coote's Ecclesiastical Practice, Introd. p. 8. See also Godolphin (Introd. p. 22), who, after describing the grant of William I. to the Bishops, says, "So that, before the Conquest, there were no such Courts in England as we now call Courts Ecclesiastical or Spiritual." Godolphin quotes Selden's notes on Eadmerus. See also Blackstone, B. iii. c. 5.

[3] The case of Battle Abbey and the Bishop of Chichester curiously illustrates the conflict of jurisdiction between pope and king. The following is the account of Professor Pearson in his "Early and Middle Ages of England," p. 351.

"Once a question of disputed jurisdiction between Hilary, Bishop of Chichester and the monks of Battle Abbey, was tried by the king in full court. The monks claimed to be independent of all episcopal control. Their

As early, however, as the reign of William Rufus an attempt had been made by Anselm to introduce appeals to Rome: but the barons and bishops had protested that it was a thing unheard of for any one to go to Rome (by way of appeal,) without the King's leave.[1] In the reign of Stephen, however, Henry de Blois, Bishop of Winchester and legate of the Pope, succeeded in introducing them. "In Anglia appellationes non erant, donec eam Henricus Wintoniensis, dum legatus erat, malo suo crudeliter intrusit."[2] Henry the Second, however, would not permit them, and the Constitutions of Clarendon provide for the course of appeals within the realm, but enjoin "ita quod non debeat ultra procedi absque consensu domini regis."[3] It is true the same prince, in his purgation

abbey was the symbol of Norman dominion, founded by the Conqueror, and enriched even by his godless son; and the attempt to assert authority over it was nothing, they said, but Saxon jealousy of the governing classes. Hilary had procured decisions in his own favour from Rome. The king and his nobles were strongly influenced by the appeal to Norman sentiment, and indignant that the pope's interference had been solicited. Henry put forward, in the strongest manner, his pretensions to maintain all the rights ever claimed by Norman kings over the Church; the bishops and barons assisted him; and Hilary, a factious and time-serving man, was speedily clamoured down, and made abject submission. The chancellor (Becket) was present during the trial, and supported the king energetically." Mr. Pearson quotes Spelman, and Wilkins, vol. i. p. 431, and an article in the *Dublin Review*, 97, "St. Thomas at Battle Abbey."

The words of the king to the Bishop of Chichester would have suited the sixteenth century as well as the twelfth:—"Tu pro papæ auctoritate ab hominibus concessâ, contra dignatatum regalium auctoritates mihi a Deo concessas callidítate argutâ niti præcogitas.' In Labbe and Cossart a list is given of the prelates and barons who were present.

[1] 1 Burn's Eccles. Law, 57 c. Edit. 1842.

[2] Gibson's Codex, 83. Blackstone, B. iii. c. 35.

[3] The course of Appeals prescribed by the Constitutions of Clarendon is the same as that prescribed by 24 Henry VIII. chap. 12. But the ultimate stage of a cause is thus stated in "Reeve's History:"—"If the archbishop shall fail in doing justice, the cause shall at last be brought to our Lord the King, that by his precept the dispute may be determined in the Archbishop's Court." (Reeve, i. 78.) It is not clear whether, by this provision, it was intended that the royal power should be brought to bear merely to prevent abuse of the forms of justice, or whether the case was to be heard on its merits by the king, and the matter sent back, as has been always the case since the Reformation, to the Archbishop's Court, after decision. The form now commonly used, when an appeal has been decided by the Superior Court, is, "That the cause be remitted to the Court below, to the end that right and justice may be there done." Blackstone states without qualification that the Appeal was, by the Constitutions of Clarendon, given to the king. B. iii. 5.

for the murder of Becket, was constrained to swear, "Quod neque appellationes impediret neque impediri permitteret quin liberè fierent in regno suo ad Romanum pontificem in ecclesiasticis causis;" but even then it was added, "ita tamen quod si ei suspecti fuerint aliqui, securitatem faciant quod malum suum vel regni sui non quærant."[1] In subsequent reigns these appeals became common, and, though never sanctioned by the laws of England, they were allowed to remain till the time of Henry VIII.[2]

Mr. Froude gives his view of the struggle as follows, in speaking of the first Act of Appeals, 24 Hen. VIII. c. 12,[3] which was occasioned by the denial of justice by the Pope in the case of Henry VIII.'s divorce. (Hist. of England, vol. i. pp. 409, 410.)

"The authority of the Church over the State, the supreme kingship of Christ, and consequently of him who was held to be Christ's vicar, above all worldly sovereignties, was an established reality of mediæval Europe. The princes had with difficulty preserved their jurisdiction in matters purely secular; while in matters spiritual, and in that vast section of human affairs in which the spiritual and the secular glide one into the other, they had been compelled—all such of them as lay within the pale of the Latin communion—to acknowledge a power superior to their own. To the popes was the ultimate appeal in all causes of which the spiritual courts had cognizance. Their jurisdiction had been extended by an unwavering pursuit of a single policy, and their constancy in the twelfth century was rewarded by absolute victory. In England, however, the field was no sooner won, than it was again disputed, and the civil government gave way at last only when the danger seemed to have ceased. So long as the papacy was feared; so long as the successors of St. Peter held a sword

[1] Gibson's Codex, 83.

[2] Blackstone (B. iii. c. 5) states that they prevailed from John and Hen. III. to the Reformation. A curious instance of appeals to Rome on their renewal in the time of Mary may be seen in the last clauses of the Act 1 Eliz. I. where provision is made that the decisions in the cases of Chetwoode and Harcourt shall hold good if pronounced at Rome within sixty days.

[3] See also Hallam's Const. Hist. i. c. 2. "In the next session an Act was passed to take away all appeals to Rome from Ecclesiastical Courts, which annihilated at one stroke the jurisdiction built on long usage and on the authority of the false Decretals."

which could inflict sensible wounds, and enforce obedience by penalties, the English kings had resisted both the theory and the application. While the pope was dangerous, he was dreaded and opposed. When age had withered his arm, and the feeble lightnings flickered in harmless insignificance, they consented to withdraw their watchfulness, and his supremacy was silently allowed as an innocent superstition. It existed, as some other institutions exist at the present day, with a mere nominal authority; with a tacit understanding that the power which it was permitted to retain should be exerted only in conformity with the national will. Under these conditions the Tudor princes became loyal subjects to the Holy See, and so they would have willingly remained, had not Clement, in an evil hour for himself, forgotten the terms of the compact. He laid upon a legal fiction a strain which his predecessors, in their palmiest days, would have feared to attempt; and the nation, after grave remonstrance, which was only received with insults, exorcised the chimæra with a few resolute words for ever."

II.

This new attitude of the English nation towards the See of Rome is represented by the memorable preamble of the Statute 24 Hen. VIII. c. 19, a document which, more than any other, marks the epoch of the final rupture, but upon which a somewhat undue stress has been laid in modern controversies. It is, however, well worth a careful study. It is as follows:—

"Where by divers sundry old authentick histories and chronicles, it is manifestly declared and expressed, that this realm of England is an empire, and so hath been accepted in the world, governed by one supreme head and king, having the dignity and royal estate of the imperial crown of the same; unto whom a body politick, compact of all sorts and degrees of people, divided in terms, and by names of spirituality and temporality, been bounden and owen to bear, next to God, a natural and humble obedience; he being also institute and furnished, by the goodness and sufferance of Almighty God, with plenary, whole, and entire power, preeminence, authority, prerogative, and jurisdiction, to render and yield justice, and final determination to all manner of folk, resiants, or subjects within this his realm, in all causes, matters, debates, and contentions, happen-

ing to occur, insurge, or begin within the limits thereof, without restraint, or provocation to any foreign princes or potentates of the world; the body spiritual whereof having power, when any cause of the law divine happened to come in question, or of spiritual learning, then it was declared, interpreted, and showed by that part of the said body politick, called the spirituality, now being usually called the English Church, which always hath been reputed, and also found of that sort, that both for knowledge, integrity, and sufficiency of number, it hath been always thought, and is also at this hour, sufficient and meet of itself, without the intermeddling of any exterior person or persons, to declare and determine all such doubts, and to administer all such offices and duties, as to their rooms spiritual doth appertain, for the due administration whereof, and to keep them from corruption and sinister affection, the king's most noble progenitors, and the antecessors of the nobles of this realm, have sufficiently endowed the said church, both with honour and possessions; and the laws temporal, for trial of property of lands and goods, and for the conservation of the people of this realm in unity and peace, without rapine or spoil, was and yet is administered, adjudged, and executed by sundry judges and ministers of the other part of the said body politick, called the temporalty; and both their authorities and jurisdictions do conjoin together in the due administration of justice, the one to help the other."

Now it is very important to recollect the time at which this statute was passed, and the circumstances which it was designed to meet, since they form as it were the historical context by which to interpret it. [1] It was the beginning of the year 1533. More had in the previous year ceased to be chancellor. Cranmer had become Archbishop. The king had secretly married Anne Boleyn, and had determined on a rupture with Rome. Finding that he could obtain no sentence from the Pope, he was resolved to trust to the courts of the realm exclusively, and to prevent an appeal in his cause to Rome. We may regard this special case which the framers of the statute had in view as the occasion which led to the assertion of a great principle, the independence of

[1] See the dates of the principal events of this period, p. 109. The Parliament met on the 4th of February, 153$\frac{3}{4}$.

the realm from all foreign jurisdiction. It was natural that in making this assertion, the highest dignity should be ascribed to the estates of the realm, and especially the spiritualty, on whose authority, now vindicated, a most important public act[1] was about to be done. But an Act, the object of which was mainly to assert the authority of the spiritualty of the realm against a foreign power, is certainly not that to which we should look for the guarded language which would have been used if the object had been to define the mutual relations of the spiritualty and temporalty within the realm, with a view to a possible conflict of jurisdiction. We should be very cautious therefore in attributing to the language of this Preamble a weight which its historical connexion does not warrant. It has been maintained indeed by some writers,[2] that this language is the key-note on which all the legislation of the Reformation depended, and by which other statutes are to be interpreted. Such writers have assumed that in passing this Act it was intended that all causes in which doctrine was

[1] "The Act of Appeals having passed, Convocation was the authority to which the power of determining unsettled points of spiritual law seemed to have lapsed. In the month of April (1533), therefore, Cranmer, now Archbishop of Canterbury, submitted to it the two questions, on the resolution of which the sentence which he was to pass was dependent." (Froude, vol. i. p. 418.)

Mr. Froude goes on to state that the two questions were—

1. Was it lawful to marry the widow of a brother dying without issue, but having consummated his marriage?

2. Was the Levitical prohibition grounded on a Divine law, with which the pope could not dispense?

And upon this succeeded the trial of the King's case, at Dunstable, by Cranmer, and the final sentence of Divorce, May 23d, 1533.

[2] Gibson, trusting to the principle which he considered to be asserted by this Preamble, makes it the rule by which to try all questions of legislation, and draws from it the inferences—1. That prohibitions should not be allowed to issue from the Common Law Courts. 2. That in matters partly belonging to temporal, partly to the ecclesiastical law, the Ecclesiastical Courts shall have the same power of reference to the Temporal Courts which the Temporal have to the Ecclesiastical. 3. That the Ecclesiastical Courts should interpret all statutes relating to spiritual matters. 4. That in ecclesiastical causes before the Court of Delegates, the Court should be composed only of ecclesiastics and ecclesiastical lawyers. 5. That in matters of policy relating to religion the Crown should have spiritual persons as advisers.—*See* Gibson's Codex, Introduction. See, also, letter to the Bishop of London by the Right Hon. W. E. Gladstone (Murray, 1850); and Quarterly Review, for April, 1864,—"The Privy Council Judgment."

involved, should be tried by spiritual persons exclusively. It is, doubtless, easy in a period of transition like the middle of the 16th century, to find words in public documents which make in favour of a preconceived theory; but if we look at the practical tendency of the legislation of the later years of Henry VIII., we shall find no support for the idea that it was the intention of the King and Parliament to confine to the clergy either the making or the administration of the laws relating to religion.

It is material to notice, 1. That the Statute of which the Preamble has been quoted by no means relates to all Ecclesiastical causes. It is limited to questions of matrimony, wills, and tithes. Whatever had been the course of appeals in matters of doctrine and clerical discipline remained unaltered; and it would seem that such causes might still have gone on appeal to the Court of Rome, since the statute passed at the beginning of the next year (1534) forbids the carrying of appeals of any kind to Rome after Easter, 1534.[1]

2. That the statute of the next year, "For the submission of the Clergy and restraint of Appeals," provides for a revision of the ecclesiastical laws by a Commission of thirty-two persons, but expressly enacts that one half of the Commissioners shall be laymen.

3. That the King's Vicegerent in Ecclesiastical affairs was a layman. This office was not only first filled by a layman, Thomas Cromwell, but was recognised as a lay office, as was also that of the Sovereign himself, by the statute 37 Hen. VIII. c. 17, which will be quoted below. The King's Vicegerent was the representative of the Sovereign in all Ecclesiastical functions and dignities. He sat above the Archbishop in the House of Lords.[2] He presided in Convocation.[3] He was considered capable of dealing with all Ecclesiastical causes of whatever kind.[4] Indeed the com-

[1] See the Judgment of Lord Campbell in the Gorham case, p. 109, and the note, giving the principal dates of the years 1832-4.

[2] Act of Precedence, 31 Hen. VIII. c. 10, which was never repealed, and gives this dignity to all future Vicegerents.

[3] Burnet, i. 427.

[4] Burnet, i. Pt. 2, 288, Licentia regia concessa Domino Episcopo ad exercendam jurisdictionem episcopalem. See also Comyn's Digest. Prerogative (D.) 11.

mission given to Bonner for the exercise of his episcopal functions clearly states,[1] that it is only from the impossibility of the King's Vicegerent in person performing all his duties, that the power of ordination itself is committed to the Bishop.

4. That by the Statute of Heresy, 25 Hen. VIII. c. 14, Justices, Sheriffs, and Stewards, as well as Ordinaries, were "assigned to inquire of heresies." Indeed, it has been supposed that by that statute no man could be accused of heresy except by being first brought before the justices.[2] Even under the retrograde Act of the Six Articles,[3] the Commissions were not formed exclusively of ecclesiastics, and in the "Act concerning the Qualification of the Statute of the Six Articles," it is enacted that certain powers for the repression of heresy shall only be exercised by two Commissioners, "whereof one of them to be a lay person." And to this Act the clergy at least as much as others were subject (35 Hen. VIII. c. 5, ss. 1, 3).

5. The language of the Statute, 37 Hen. VIII. c. 17, which gave the power to laymen to be judges in Ecclesiastical Courts,[4]

[1] The words are :—Quia tamen ipse Thomas Cromwell negotiis adeo præpeditus existit, quod ad omnem jurisdictionem nobis uti supremo capiti hujusmodi competentem in suâ personâ expediendam non sufficiet, vices tibi nostras committendas fore, teque licentiandum esse decernimus *ad ordinandum* quoscumque idoneos invenies, *ad omnes etiam sacros et presbyteratus ordines promovendum.* Burnet, *Ibid.*

[2] Froude, vol. ii. 193. Mr. Coote says : Trials for heresy, or rather as they were always called, for heretical depravity (causæ hæreticæ pravitatis), were never instituted in the Court of the Bishop before 2 Hen. IV. c. 15. Before that statute, it was required that the conviction should take place in a general convocation of the whole Province. Eccles. Pract. Introd. p. 20. By the previous statute of 5 Rich. II. sheriffs of counties were to arrest preachers of heresy and their abettors. Hallam's Middle Ages, ch. viii. pt. iii. See, also, Blackstone, B. iv. c. 4, who states that indictment for heresy by this Act was to be by two credible witnesses, or by indictment in a Court of Common Law.

[3] See Blackstone, B. iv. c. 4. So also afterwards in the reign of Mary the inquisitorial commission of 1557 contained lords, gentlemen, and doctors of laws, as well as bishops and clergy.—Burnet's Ref. ii. 697. And the Commissions for hearing the appeals of the deprived Bishops were directed to laymen and clergy together. *Infra*, p. lv.

[4] The Act is as follows :—

"*A Bill that Doctors of Civil Law, being married, may exercise Ecclesiastical Jurisdiction.*"

"§ 1. In most humble wise shew and declare unto your highness, your most faithful, humble, and obedient subjects, the lords spiritual

may justly be quoted as illustrating in a practical form the tendencies of the Statutes of the Reformation, and as showing

and temporal, and the commons, of this present parliament assembled, that where your most royal majesty is and hath always justly been, by the word of God, supreme head in earth of the Church of England, and hath full power and authority to correct, punish, and repress all manner of heresies, errors, vices, sins, abuses, idolatries, hypocrisies, and superstitions, sprung and growing within the same, and to exercise all other manner of jurisdictions, commonly called ecclesiastical jurisdiction: Nevertheless the Bishop of Rome and his adherents, minding utterly as much as in him lay to abolish, obscure, and delete such power given by God to the princes of the earth, whereby they might gather and get to themselves the government and rule of the world, have, in their councils and synods provincial, made, ordained, established, and decreed, divers ordinances and constitutions, that no lay or married man should or might exercise or occupy any jurisdiction ecclesiastical, nor should be any judge or register in any court commonly called ecclesiastical court, lest their false and usurped power, which they pretended and went about to have in Christ's church, should decay, wax vile, and be of no reputation, as by the said councils and constitutions provincial appeareth: which standing and remaining in their effect, not abolished by your grace's laws, did sound to appear to make greatly for the said usurped power of the said Bishop of Rome, and to be directly repugnant to your majesty as supreme head of the church, and prerogative royal, your grace being a lay-man.

"§ 2. And albeit the said decrees, ordinances, and constitutions, by a statute made in the five and twentieth year of your most noble reign, be utterly abolished, frustrate, and of none effect; yet because the contrary thereunto is not used, nor put in practice by the archbishops, bishops, archdeacons and other ecclesiastical persons, who have no manner of jurisdiction ecclesiastical, but by, under, and from your royal majesty, it addeth, or at the least may give occasion to some evil-disposed persons to think, and little to regard the proceedings and censures ecclesiastical made by your highness and your vicegerent, officials, commissaries, judges, and visitators, being also lay and married men, to be of little or none effect or force, whereby the people gathereth heart and presumption to do evil, and not to have such reverence to your most godly injunctions and proceedings as becometh them.

"§ 3. But forasmuch as your majesty is the only and undoubted supreme head of the Church of England, and also of Ireland, to whom by Holy Scripture all authority and power is wholly given to hear and determine all manner of causes ecclesiastical, and to correct vice and sin whatsoever, and to all such persons as your majesty shall appoint thereunto; that, in consideration thereof, as well for the instruction of ignorant persons, as also to avoid the occasion of the opinion aforesaid, and the setting forth of your prerogative royal and supremacy:

how little the theory above alluded to was practically allowed to affect the conduct of affairs where a contrary course was deemed to be for the interests of the nation. The king is there spoken of in a significant way as a layman: and the argument of the 1st clause is that since the head of the church is a layman, it is inconsistent that laymen should be debarred from being judges of ecclesiastical matters. A perusal of this Statute will show what the framers of the laws of this period understood by the supremacy of the Crown in Ecclesiastical matters.

III.

The provisions of the first Statute of Appeals (24 Hen. VIII. c. 12) are less comprehensive in their scope than the preamble might lead us to expect. After describing the inconveniences of appeals to Rome, it enacts (§ 2) that "All causes testamentary, causes of matrimony and divorces, rights

"§ 4. It may therefore please your highness, that it may be ordained and enacted by authority of this present parliament, that all and singular persons, as well lay, as those that be now married or hereafter shall be married, being doctors of the civil law, lawfully create and made in any university, which shall be made, ordained, constituted, and deputed to be any chancellor, vicar general, commissary, official, scribe, or register, by your majesty, or any of your heirs or successors, or by any archbishop, bishop, archdeacon, or other person whatsoever, having authority under your majesty, your heirs and successors, to make any chancellor, vicar general, commissary, official, or register, may lawfully execute and exercise all manner of jurisdiction, commonly called ecclesiastical jurisdiction, and all censures and coertions appertaining, or in any wise belonging unto the same, albeit such person or persons be lay, married or unmarried, so that they be doctors of the civil law, as is aforesaid; any law, constitution, or ordinance to the contrary notwithstanding." *

* In Walker *v.* Lamb (Sir John) (Cro. Cas. 258) it was adjudged that a grant of any office specified in this statute is good though not made to a doctor of civil law; partly because the only design of the statute was to declare who might enjoy such offices, viz. lay and married men, and partly because the statute is wholly affirmative, without any restriction; and, notwithstanding it enacts that doctors of civil law (although lay persons or married) shall have such offices, it does not enact that none others shall have them. Stephens, Eccl. Stat. 289. Mr. Stephens adds, that had the statute been taken in the more limited sense, it would have restricted the offices of registrar, scribe, &c. to doctors of laws.

of tithes, oblations and obventions (the knowledge whereof by the goodness of princes of this realm, and by the laws and customs of the same, appertaineth to the spiritual jurisdiction of this realm), already commenced," whether they concern the King or others, shall be finally and definitely adjudged within the King's jurisdiction; and that the sentences in such causes shall take effect, as shall also all the spiritual acts of the clergy, without hindrance from any censure or excommunication from Rome. Further (§ 3), that any person in any way procuring the interference of the see of Rome in any of the causes aforesaid, shall incur the penalties of the Statute of Provision and Præmunire. The clauses regulating appeals within the realm are as follows:—

"§ 5. And furthermore, in eschewing the said great enormities, inquietations, delays, charges, and expenses hereafter to be sustained in pursuing of such appeals, and foreign process, for and concerning the causes aforesaid, or any of them, do therefore, by authority aforesaid, ordain and enact, that in such cases where heretofore any of the king's subjects or resiants have used to pursue, provoke, or procure any appeal to the see of Rome, and in all other cases of appeals, in or for any of the causes aforesaid, they may and shall from henceforth take, have, and use their appeals within this realm, and not elsewhere, in manner and form as hereafter ensueth, and not otherwise; that is to say, first from the archdeacon, or his official, if the matter or cause be there begun, to the bishop diocesan of the said see, if in case any of the parties be grieved.

"§ 6. And in like wise if it be commenced before the bishop diocesan, or his commissary, from the bishop diocesan, or his commissary, within fifteen days next ensuing the judgment or sentence thereof there given, to the archbishop of the province of Canterbury, if it be within his province; and if it be within the province of York, then to the Archbishop of York; and so likewise to all other archbishops in other the king's dominions, as the case by order of justice shall require; and there to be definitively and finally ordered, decreed, and adjudged, according to justice, without any other appellation or provocation to any other person or persons, court or courts.

"§ 7. And if the matter or contention for any of the causes aforesaid be or shall be commenced, by any of the king's subjects or

resiants, before the archdeacon of any archbishop, or his commissary, then the party grieved shall or may take his appeal, within fifteen days next after judgment or sentence there given, to the court of the Arches or Audience of the same archbishop or archbishops; and from the said court of the Arches or Audience within fifteen days then next ensuing after judgment or sentence there given, to the archbishop of the same province, there to be definitively and finally determined, without any other or further process or appeal thereupon to be had or sued.

"§ 8. And it is further enacted by the authority aforesaid, that all and every matter, cause, and contention now depending, or that hereafter shall be commenced by any of the king's subjects or resiants, for any of the causes aforesaid, before any of the said archbishops, that then the same matter or matters, contention or contentions, shall be before the same archbishop where the said matter, cause, or process shall be so commenced, definitively determined, decreed, or adjudged, without any other appeal, provocation, or any other foreign process out of this realm, to be sued to the let or derogation of the said judgment, sentence, or decree, otherwise than is by this act limited and appointed; saving always[1] the prerogative of the archbishop and church of Canterbury, in all the foresaid causes of appeals, to him and to his successors, to be sued within this realm, and in such and like wise as they have been accustomed and used to have heretofore."

The Act goes on to provide that, in causes in which the King or his successors shall be concerned, an appeal from any of the said courts shall lie to the "prelates and other abbots and priors of the Upper House assembled and convocate by the King's writ in the Convocation being or next ensuing."

It must not be forgotten that the statute is limited to causes of matrimony, wills, and tithes. It does not con-

[1] The allusion here probably is to the indefinite power which the Archbishop of Canterbury had acquired as legate ex officio (or legatus natus) of the Pope, some accessories of which might remain, though the substance of Papal authority was gone. The only relic of this power which is known to remain, is that which is recognised by 25 Hen. VIII. c. 21, § 4, by which the Archbishop of Canterbury is empowered to grant throughout the realm "the licences, faculties, &c. accustomed to be had at the see of Rome." The Commissary empowered by that Act to exercise this power in the name of the Archbishop is called the Master of the Faculties. The granting of special licences for marriages, and the conferring of degrees are instances of this power. See 3 Stephen's Commentaries, ch. I.; Coke's Inst. iv. 337.

template cases of spiritual discipline. But it acquires importance from the provision in the statute of the next year, which enacted that all appeals of whatever nature should be made in the manner here prescribed.

It so happened that the provision relating to the King's causes never took effect. In the matter of the divorce Queen Catherine did not appeal, having refused to acknowledge the authority of the Archbishop's Court. And the Act of the next session has been interpreted as giving the appeal even in causes concerning the King to the Court of Delegates.[1]

It is very doubtful whether by this Act each Archbishop in England and Ireland would have been allowed to decide finally on all the causes specified which arose within his jurisdiction. Notwithstanding the stringency of the language used,[2] it might have been held that an appeal lay of common right to the King, as it was afterwards held that a Commission of Review might be issued, notwithstanding the provisions in the Statutes,[3] by which the appellate jurisdiction was given to the King in Chancery.[4] But this question is of little moment, since the same Act which subjects the appeal in spiritual causes to the course prescribed by this Statute, gives the final appeal to the King in Chancery. To that Act we now apply ourselves.

IV.

The Statute 25 Hen. VIII. c. 19, is entitled, "The Submission of the Clergy and Restraint of Appeals." Its object is twofold, viz. to make a settlement—I. Of the Canon Law of the Realm; II. Of the course of Appeals in all Ecclesiastical Causes.

I. It confirms the Act of Submission made by the Clergy, and their promise *in verbo sacerdotii* to make no new canons without the King's licence. It then gives power to the King to appoint a Commission of thirty-two persons, "whereof sixteen to be of the clergy and sixteen to be of the temporalty

[1] See the Judgment of Lord Campbell in the Gorham case, p. 109, 113.

[2] Viz. that the causes shall be *finally* determined without any other process or appeal. See also note at p. xlii.

[3] 25 Hen. VIII. c. 19, and 28 Hen. VIII. c. 6.

[4] See also opinion of Judges as to an appeal lying of common right to th King. p. 323.

of the upper and nether house of Parliament,"[1] for the purpose of reviewing the canons and constitutions; and enacts that such canons as they shall deem worthy to remain shall alone be binding, the King's consent to them being given.

II. The sections relating to Appeals are as follows:—

"§ 3. And be it further enacted by authority aforesaid, that from the feast of Easter, which shall be in the year of our Lord God 1534, no manner of appeals shall be had, provoked, or made out of this realm, or out of any of the king's dominions, to the Bishop of Rome nor to the see of Rome, in any causes or matters happening to be in contention, and having their commencement and beginning in any of the courts within this realm, or within any of the king's dominions, of what nature, condition, or quality soever they be of; but that all manner of appeals, of what nature or condition soever they be of, or what cause or matter soever they concern, shall be made and had by the parties aggrieved, or having cause of appeal, after such manner, form, and condition, as is limited for appeals to be had and prosecuted within this realm in causes of matrimony, tithes, oblations, and obventions, by a statute thereof made and established sithen the beginning of this present parliament, and according to the form and effect of the said estatute; any usage, custom, prescription, or any thing or things to the contrary hereof notwithstanding.

"§ 4. And for lack of justice at or in any the courts of the archbishops of this realm, or in any the king's dominions, it shall be lawful to the parties grieved to appeal to the king's majesty in the king's court of Chancery; and that upon every such appeal, a commission shall be directed under the great seal to such persons as shall be named by the king's highness, his heirs or successors, like as in case of appeal from the Admiral's court, to hear and definitively determine such appeals, and the causes concerning the same. Which commissioners, so by the king's highness, his heirs or successors, to be named or appointed, shall have full power and authority to hear and definitively determine every such appeal, with the causes and all circumstances concerning the same; and that such judgment and sentence, as the said commissioners shall

[1] The Commission had no result, and no report from any body of the kind was made during Henry VIII.'s reign. In the time of Edward VI. a Commission was appointed, which produced the Reformatio Legum. The Commission was composed in equal proportions of bishops, divines, civilians, and common-lawyers. 4 Reeve, 543.

make and decree, in and upon any such appeal, shall be good and effectual, and also definitive; and no further appeals to be had or made from the said commissioners for the same."

Then follows the enactment of a Præmunire against those who should, after Easter, 1534, resort to Rome; and an appeal from places exempt from the ordinary jurisdiction is given to the King in Chancery.

This Statute, it will be remarked, embraces all causes whatsoever, and involves therefore matters of far more lasting moment than those to which the Statute of the previous year relates. Its importance as affecting matters of doctrine was probably not much felt at first. In the troubled times of the next century and a half shorter methods[1] were found for dealing with matters relating to religion, such as the Commissions under the Six Articles Act, and the Court of High Commission which lasted till 1640. But when, after the Romanist and Puritan controversies, the waves of agitation had subsided, the Statute re-emerged and became the rule for the ordinary course of law.

The Appeal is given not to any Ecclesiastical body but to the King in Chancery. It has sometimes been supposed,[2] from the phrase "for lack of justice," that this provision was not intended to create a regular appellate jurisdiction, but only to give a power of controlling and correcting the jurisdiction of the ordinary Courts, as on an "Appel comme d'Abus" which is said to prevail in France. But the power given to the Commissioners is to deal with "the causes and all circumstances concerning the appeal" (§ 4). The provision also which gives the appeal to the King from the exempt jurisdictions, enacts distinctly that this appeal shall be similar to that which had been made to the Pope.[3] Moreover the

[1] See infra, p. xliii., xliv.

[2] Speech of Bishop Blomfield on the Bill for Ecclesiastical Appeals. June 3, 1850. Hansard, vol. cxi. Mr. Gladstone's Letter to Bishop of London, 1850.

[3] The words are as follows:—

"§ 6. Provided always, that all manner of provocations and appeals hereafter to be had, made, or taken from the jurisdiction of any abbots, priors, or other heads and governors of monasteries,

Act of Appeals for Ireland, which is parallel to the English Act, speaks in the same way of the Appeal to the King having taken the place of Appeals to the Pope, using the very same words, "lack of justice," and directing that the Delegates shall determine the principal matter itself, as well as the "grievances" on which alone an "Appeal of Abuse" would proceed.[1]

So far, indeed, was the Royal Supremacy from being understood to be limited to the mere correction of Abuses in the Ecclesiastical Courts, that the Crown claimed an original power of entertaining an Appeal on its merits, apart from the

abbeys, priories, and other houses and places exempt, in such cases, as they were wont or might afore the making of this act, by reason of grants or liberties of such places exempt, to have or make immediately any appeal or provocation to the Bishop of Rome, otherwise called Pope, or to the see of Rome, that in all these cases every person and persons, having cause of appeal or provocation, shall and may take and make their appeals and provocations immediately to the king's majesty of this realm, into the court of Chancery, in like manner and form as they used afore to do to the see of Rome; which appeals and provocations so made shall be definitively determined by authority of the king's commission, in such manner and form as in this act is abovementioned."

[1] 28 Hen. VIII. c. 6, s. 2. "And to the intent that the subjects and resiants of this land shall and may take and hear the appeales in their just and lawful causes, for lacke of justice within this land, be it further enacted by authority of this present parliament, that in and for all maner of causes, griefes, and cases, as they or any of them were wont and accustomed to have in their provocations, appeales, and other process in cases of debate and contention, to or from the Bishop of Rome, or to or from the see apostolike, or court of Rome, they now being grieved, shall have, take, and use from the first day of this present parliament their provocations, appeales, and such like process, to the King of England and Lord of Ireland, his heyres and successors, or to his or their lieutenant, deputie, justice, or other governour, whatsoever he be, of this land of Ireland for the time being, to his or their court of chauncerie, within the same realm of England or land of Ireland: and that upon every such provocation, appeal, and process made to the king of England, and Lord of Ireland, and to his heyres and successors, the chancellor of England, or keeper of the great seale for the time being, shall grant a commission of delegacy to some discreet and well learned persons of this land of Ireland or else in the realm of England, for final determination of all causes and griefs contained in the said provocations and appeals, and in the principal matter, and in all circumstances and dependants thereupon."

Act of Parliament. It is well known that, notwithstanding the strong language used by this Statute, which appears to make the King in Chancery the final Court of Appeal, yet in fact the last resort in any important cause was to the King in Council. After a sentence by the Delegates under 25 Hen. VIII. c. 19, § 4, it was still held that the King was not precluded from granting a fresh commission to review the sentence.[1]

This power of reviewing a sentence appears to have been recognised very early, as is seen by the case of Goodman, Dean of Wells,[2] who was ejected by the Bishop of Bath and Wells in the time of Edward VI. He appealed to the King in Chancery, but the sentence against him was confirmed. In the time of Queen Mary, however, a Commission of Review was issued, which reinstated him in his Deanery, annulling the sentence of the Delegates, and ejecting the Protestant dean, Turner, who had succeeded him. On the accession of Elizabeth, Turner applied for another Commission of Review, which was granted, and by which he regained the deanery;

[1] Coke, Inst. IV. 341. This right is thus stated by Mr. Justice Williams (Law of Executors, vol. i. p. 437, 3rd Edit.) "No Appeal lay from a sentence in the Court of Delegates, not even to the Lords in Parliament. But on a petition to the King in Council, a Commission of Review might be granted under the great seal, appointing new judges, or adding more to the former judges, to revise, review, and re-hear the cause; for the King was not restrained by the statutes 24 & 25 Hen. VIII.; and the pope, as supreme head, whose authority is now annexed to the Crown by the statutes 26 Hen. VIII. c. 1, and 1 Eliz. c. 1, had power to do it." (4 Inst. 341, Co. Eliz. 57).

It has been suggested that this power of reviewing a sentence was contemplated in the wording of the statute 25 Hen. VIII. c. 19, since that statute does not enact that the sentence of the Delegates shall be "final," but merely "effectual and definitive." A definitive sentence is one which determines on the merits of the case, and adjudges it so far as the court in which such sentence is pronounced can decide. It is contrasted with an interlocutory judgment, which does not usually deal with a case on its merits, but is on some incidental question; but a definitive sentence is not necessarily final, *i.e.* without appeal. It would not, however, seem right to lay any great stress on the distinction between the words final and definitive, as used in these statutes; for by the language of the Irish statute 28 Henry VIII. c. 6, the Commission of Delegates is to be appointed "for the *final* determination of all causes and griefs contained in the provocation or appeal;" yet Commissions of Review have been issued for Irish as well as for English causes.

[2] Walrond *v.* Pollard. Dyer, 273. See also Lord Campbell's judgment in Gorham *v.* Bishop of Exeter, *infrâ*, p. 113.

and even a third Commission of Review was granted on the application of Goodman, which, however, finally confirmed the ejection of the Roman Catholic dean.

In truth, the Statute which gave the Appeal in Ecclesiastical causes to the Sovereign, has been looked upon by the greatest legal authorities as the means by which a foreign system of law, which had been allowed for certain purposes to operate in this country, and had for a time asserted independence, was finally subjected to the supremacy of the English laws. Blackstone, who speaks of the introduction of the Ecclesiastical Courts by William the Conqueror as "an invasion of Saxon liberty and the abolition of the union of jurisdiction,"[1] describes their subjection to the Crown as the restoration of that union. "From all these Courts," he says, "an appeal lies to the King in the last resort, which proves that the jurisdiction exercised in them is derived from the Crown of England, and not from any foreign potentate or intrinsic authority of their own. And from these three strong marks and ensigns of authority" (viz. the power of prohibition, and of interpretation of Ecclesiastical Statutes possessed by the Courts of Common Law, and the appeal to the King), "it appears beyond a doubt that the civil and canon laws, though admitted in some cases by custom in some courts, are only subordinate, and *leges sub graviore lege*."[2]

V.

It has already been remarked that the course of ordinary justice in ecclesiastical affairs was interrupted for many years after the passing of the Acts of Appeals. In the time of Edward VI. there were Commissions of heresy and Visitors appointed by the Council.[3] In the time of Mary the Appeal to the Pope was revived and brought into action. In Elizabeth's reign there were several commissions, culminating in the famous Court of High Commission, established in 1583.[4]

[1] Comment. B. iii. 1. 5. [2] Ibid. Introd. § 3. [3] Froude, vol. v. 167.

[4] The following description of the Court of High Commission is given by Hallam, Const. Hist. i. 271 :—

"The Act of Supremacy, while it restored all ecclesiastical juris-

It is evident that, with such a power for the punishment of ecclesiastical offences always at hand, no prosecutor would be likely to prefer the slow process of the ordinary Ecclesiastical

diction to the crown, empowered the queen to execute it by commissioners appointed under the great seal, in such manner and for such time as she should direct; whose power should extend to visit, correct, and amend all heresies, schisms, abuses, and offences whatever, which fall under the cognizance and are subject to the correction of spiritual authority. Several temporary commissions had sat under this act with continually augmented powers, before that appointed in 1583, wherein the jurisdiction of this anomalous court almost reached its zenith. It consisted of forty-four commissioners, twelve of whom were bishops, many more privy councillors, and the rest either clergymen or civilians. This commission, after reciting the acts of supremacy, uniformity, and two others, directs them to inquire from time to time, as well by the oaths of twelve good and lawful men, as by witnesses and all other means they can devise, of all offences, contempts, or misdemeanours done and committed contrary to the tenor of the said several acts and statutes; and also to inquire of all heretical opinion, seditious books, contempts, conspiracies, false rumours or talks, slanderous words and sayings, &c. contrary to the aforesaid laws. Power is given to any three commissioners, of whom one must be a bishop, to punish all persons absent from church, according to the act of uniformity, or to visit and reform heresies and schisms according to law; to deprive all beneficed persons holding any doctrine contrary to the thirty-nine articles; to punish incests, adulteries, and all offences of the kind; to examine all suspected persons on their oaths, and to punish all who should refuse to appear or to obey their orders, by spiritual censure or by discretionary fine or imprisonment; to alter and amend the statutes of colleges, cathedrals, schools, and other foundations, and to tender the oath of supremacy according to the act of parliament. (Neal, 274. Strype's Annals, iii. 180.)

"The germ of the high commission court seems to have been a commission granted by Mary (February, 1557), to certain bishops and others to inquire after all heresies, punish persons misbehaving at church, and such as refused to come thither, either by means of presentments by witness, or any other politic way they could devise, with full power to proceed as their discretions and consciences should direct them, and to use all such means as they could invent, for the searching of the premises, to call witnesses, and force them to make oath of such things as might discover what they sought after. (Burnet, ii. 347.) But the primary model was the Inquisition itself.

"It was questioned whether the power of deprivation for not reading the common prayer, granted to the high commissioners, were legal; the act of uniformity having annexed a much smaller

Courts.[1] And there was no appeal from these tribunals. "Such appeal," says Mr. A. J. Stephens,[2] "did not lie from the High Commission Court when in being (Dyer, 209), because they were themselves the King's Delegates (4 Inst. 340), as acting by immediate commission from him; and there was no remedy against their sentences, but a new Commission to others grantable in virtue of the Royal prerogative, and independent from the statute."[3] The High Commission lasted till 1640, when other causes supervened which equally interrupted the ordinary course of justice. It is not, therefore, till after the Restoration that the King in Chancery can be said to have been practically the Court of Appeal in matters of a spiritual nature.

VI.

The history and practice of the Court of Delegates is more obscure and less instructive than might have been expected. We have seen how its functions were in a great measure superseded in the times before the Restoration. But even after that event its whole history does not furnish so good an illustration of our subject as will be gained by future students from the history of the thirty years since its abolition.

The Restoration, which brought back the normal course of judicature, brought also rest, if not stagnation, in ecclesiastical matters. The cases in which false doctrine was

penalty. But it was held by the judges in the case of Cawdry (5 Coke, *Reports*), that the act did not take away the ecclesiastical jurisdiction and supremacy which had ever appertained to the crown, and by virtue of which it might erect courts with as full spiritual jurisdiction as the archbishops and bishops exercised."

[1] See the mention of Cawdry's case by Hallam, just quoted. He was deprived, under 1 Eliz. c. 2, sect. 4, 5, for depraving the Book of Common Prayer. The Act provides that suspension shall be the punishment for the first offence. The sentence was pronounced by the Bishop of London. Coke, v. 15.

[2] Note in Eccles. Stat. 151.

[3] Coke says that a Commission of Review might be granted upon a sentence of the High Commissioners, even though no express clause to that effect had been inserted, as it was, in the Commission. 4 Inst. 341. See also Com. Dig. Prerog. D. 16.

charged against clergymen before the Court of Delegates are very few, and a return made to the House of Commons in 1850, of the "Causes depending before the High Court of Delegates at any time to which the records of the Court may extend, wherein the subject matter has been a Charge of Heresy or unsound Doctrine, brought against a Clerk in Holy Orders," gives only three cases, viz. Salter *v.* Davis, 1690, Pelling *v.* Whiston, 1713,[1] and Havard *v.* Evanson, 1775.[2] It is necessary, however, to state the leading facts with a view to enabling the reader to compare the present Court of Appeal with that for which it was substituted by the Acts of 1832, 33 and 40.

The forms of the Court were borrowed from those of the Pope's Court of Chancery, according to the original statute, which prescribes that the appeals should be "made in manner and form as they used afore to do to the See of Rome." (25 Hen. VIII. c. 19, § 6.) A petition[3] from the appellant was presented to the Lord Chancellor, praying that a Commission of Appeal might issue under the Great Seal, and directed to Judges Delegates, to be named at his discretion.[4] The Lord Chancellor then ordered his Secretary to write upon the petition the names of those whom he appointed Delegates. These names were selected from a rota kept by the Secretary of Appeals to the Lord Chancellor. If the Common Law Judges[5] declined the commission, a further Commission of Adjuncts was issued. Upon the formation of the Commission, the usual citation[6] and inhibition were issued, and a monition to the Registrar of inferior Court to transmit the process in the case. Then the Civi-

[1] See below, p. 320.

[2] Parliamentary Paper, 322. Sess. 1850.

[3] Cockburn's Clerk's Assistant, tit. Appeals, ch. 39, § 4, 6, 7, 8.

[4] Burn (Vol. I. Appeal, p. 61) says, "No commission of Delegates, in any case of weight, shall be awarded except upon petition referred to the Lord Chancellor, who will name the Commissioners himself, to the end they may be persons of convenient quality, having regard to the weight of the cause, and the dignity of the Court from which the Appeal is," (referring to Bacon's Tracts, 294). 3 Atkyns' Chancery Rep. 798. Com. Dig. Prerog. D. 14.

[5] This relates to the last century. See below as to the constitution of the Court.

[6] The citation summoned the respondent to appear. The inhibition restrained the inferior Court from executing its sentence.

lians, who always formed part of the Commission, had a meeting at Doctors' Commons *ad informandum*,[1] after which the cause was assigned for hearing.

A fresh Commission was appointed for each case as it arose; but from the practice of naming Commissioners according to a rota, and from the necessity of having some permanent machinery, it acquired the name of the High Court of Delegates, and as such was named in the Act by which it was abolished.

Most of the proceedings, being of a merely formal nature, were taken before the civilian members of the Commission alone, (sometimes called the "Condelegates,") who seem to have acted as Surrogates. The attendance of the general body of delegates seems to have been limited usually to the opening of the Appeal by the presentation of their commission, the hearing of the case, and the delivery of the final sentence. Nor even on these occasions were the same delegates or the same number of delegates uniformly present throughout the Appeal, although a certain number was requisite to form a *quorum*. On the contrary, they varied from day to day, and it seems to have been not uncommon for some of those named as Delegates in the Royal Commission to take no part whatever in the proceedings.

The question on which it is of most importance here to gain correct information is the actual composition of the Court. Of what members was it usually formed? And does its history give a sanction to the theory that Ecclesiastical laws should be administered exclusively by Ecclesiastical persons?[2]

[1] In Whiston's case, the Bishops sat with the civilians for this purpose. See Appendix, p. 327. "The Court is held in the Dining Room at Doctors' Commons the day after the prorogation; but, when sentence is given, it is held at Serjeants' Inn." Floyer's Proctor's Practice (1746), p. 20.

[2] The opinions of Lord Coke have sometimes been quoted as if they favoured the theory that Ecclesiastical laws should be administered by Ecclesiastical, that is, by Clerical Judges. But such is by no means the true effect of the doctrines he lays down in the parts of his writings which bear upon this subject, viz. the fourth part of the Institutes and the Collection of authorities in the report of Cawdrey's case. Upon the question just stated, he nowhere pronounces an opinion: his authority on the subject can, therefore, only be cited by way of inference from his general assertions. Yet he nowhere lays down any complete theory as to the mutual relations of the Civil and Ecclesiastical powers in the State; and such opinions as he expresses should be viewed in

The authority usually quoted[1] on this subject is that of Bishop Gibson, whose work was published in 1713. It is necessary to deal fully with his statements, as they appear to have been too much relied upon, and to have given rise to serious misconceptions as to the historical precedents for the constitution of the Final Court of Appeal in Ecclesiastical Causes. The passage is as follows (Codex, Introd. p. xxi.):—

"As the *first* statute of appeals (24 Hen. VIII. c. 12,) expressly limits the cognisance of spiritual matters to spiritual persons, so this second statute (25 Hen. VIII. c. 19,) which entitles the king to the ultimate cognisance by commission, doth not *limit* him to any *other* persons, but leaves him wholly to his own choice. But though at the Reformation, when the bishops and clergy were generally *suspected* of a secret affection to the papal authority, it might be advisable to leave the king a *power* of appointing commissioners out of the *temporality* if he pleased (however contrary to the *natural reason* of the thing, and the general tenor of our constitution, as laid out in the statute of

reference to the times in which he lived and to his own career. It was the age at which Clerical and Regal pretensions were carried to the extreme point, which caused the ruin of both. Those pretensions Coke favoured, up to a certain point in his career; but, if we may trust Hallam's estimate of his character, he entirely disappointed those who had raised him to his high office in the hope that his vast legal knowledge would subserve their ends. He steered so independent a course in opposition to the encroachments of the Crown and the clergy, as eventually to lead to his suspension; and took a leading part in the constitutional resistance which was offered by the Parliament, "not," says Hallam, "without some honourable inconsistency," "redeeming in an intrepid and patriotic old age the faults which we cannot avoid perceiving in his earlier life." (Const. Hist. i. 476.) It would be as unsafe to infer from isolated expressions which he uses as to the authority of the clergy, an adherence to theories like those of Laud, as it would to suppose that he was a supporter of an unfettered Royal prerogative, because he states in "Cawdrey's case," that England is an absolute monarchy.

He asserts, no doubt, that the realm has been best governed when the Ecclesiastical and Temporal Courts have kept themselves each within their own province, not interfering with one another. But the danger which he feared was the encroachment of the Ecclesiastical Courts upon the system of Common Law over which he presided; and one of the best known scenes in his life is that in which he, with the rest of the Judges, in the presence of King James I., resisted the demands of Archbishop Bancroft and the civilians, [and,

[1] Bacon's Abridgement, 483. See also Bishop Blomfield's speech of June 3, 1850 (Published by Fellowes), in the Preface to which great use is made of the supposed opinions of Lord Coke.

appeals); yet, in fact,[1] there are no footsteps of any of the *nobility*, or *common-law* judges, in commission, till the year 1604 (*i.e.* for seventy years after the erecting of the court); nor from 1604 are they found in above one commission in forty, till the year 1639; from whence (*i.e.* from the downfall of bishops and their jurisdiction which ensued) we may date the present *rule* of mixtures in that court."

Now, it is evident that this passage is written with a strong bias in favour of the extension of the jurisdiction of spiritual persons, a feeling which is abundantly shown by other parts of his Introduction.[2] And the form thus given to the passage

and, with somewhat rude replies, vindicated the right of prohibition exercised by the Courts of Common Law. (See Gibson's Codex, Introd. xxi.; Hallam's Const. Hist. i. 440.)

He asserts strongly the independence of the spiritual power from foreign interference; and he admits that the Courts of Common Law ought to recognize the decisions of the courts of the Archbishops and other Ecclesiastical Judges, in matters properly within the Ecclesiastical Jurisdiction, because they are the King's officers, and their courts the King's Courts. But he is very far from asserting a severance of the temporalty and spiritualty, such as would involve their independence from the control of the temporal Judges. On the contrary, he asserts that the expounding of Statutes that concern Ecclesiastical Government belongs to the Common Law Judges, not to the Ecclesiastical (2 Inst. 614, quoted in Gibson's Codex, Introd. xxi.); and that "when in any case remedy is given in *foro seculari* by a Statute, the jurisdiction of the Spiritual Court ceases unless it be specially saved." (Cawdrey's Case v. Rep. See also a similar statement, III. Inst. 43.) Some of these expressions are quoted by Bishop Gibson with the greatest disapprobation, and clearly indicate the general drift of his opinions as to any possible conflict of jurisdiction between the temporal and spiritual powers.

Upon the question, however, whether laymen or ecclesiastics should be Judges in the Ecclesiastical Courts, he gives no opinion, though he dwells upon the fact that Ecclesiastical Dignitaries are the King's Judges for matters within their legal cognizance; much less does he enter upon this question in reference to the highest Court of Appeal, in which the lay and clerical elements would naturally be combined even if the lower courts were presided over by spiritual persons.

His description of the Court of Delegates and of the High Commission (4 Inst.) contain no reflections upon the composition of those Courts, in the latter of which laymen were included, while in the former (as this work will show) Common Lawyers constantly sat in his time, and laymen formed by far the largest element. Some clear expression on this point would certainly have been found, had he held any strong opinion, to which his life and writings lend so little countenance, in favour of clerical administration of Ecclesiastical Law.

[1] Reg. Offic. Cur Delegat. (Gibson's side note.)

[2] See Note above, p. xxxi. In dealing with the power of the Ecclesiastical Courts in cases of immorality amongst the Laity, as well as the Clergy, which afterwards occasioned so much odium to the Ecclesiastical jurisdiction, that the Commissioners of 1830 recommended its total abolition (see Report on

is such that it has often been interpreted[1] as asserting that his researches into the papers of the Delegates had proved that ecclesiastics only had been in the Commissions up to the year 1604, and that between 1604 and 1640 laymen had rarely been admitted. His assertion, however, only refers to peers and common-law judges, as distinguished from Ecclesiastical lawyers, lay or clerical. Civilians, therefore, were not excluded, even according to the statement of Bishop Gibson, and civilians, as we have seen, were often laymen even in the time of Henry VIII.—before the end of the 16th century they probably were usually so. And we shall find that they at all times, as a rule, formed the largest element in the Court of Delegates.

The statement of Bishop Gibson relates to three distinct periods—that from the foundation of the Court to 1604, from 1604 to 1640, and the time subsequent to the Restoration. As to the last period, which fell within the writer's own knowledge, there seems to be no reason to doubt his substantial accuracy. But as to the second period, his statement is absolutely contrary to the fact, while as to the first, the evidence which exists is against him.

We begin with Bishop Gibson's second period, from 1604 to 1639. We have no very accurate information of the first

Eccles. Courts, published 1832, pp. 62, 63), Bishop Gibson maintains that it should be left in spiritual hands; and that temporal penalties should be "provided as a further terror and punishment, to be called in as oft as the censures of the Church are disobeyed." (*Codex*, Introd. p. xxx.) Bishop Gibson also attempted, as Bishop of London, to revive the summary mode of dealing with clerical offences which had been in use before 1640, but without success. Report of Eccl. Courts Com. p. 55.

[1] Lord Harrowby, in the debate in the House of Lords, on Bishop Blomfield's Bill of 1850 for referring doctrinal questions to the Bishops, in cases of appeal, said: "I have heard it said that for seventy years after its institution, the Court of Delegates was purely spiritual in its composition; that 'none but Bishops sat on it.' But, happily, I have been able to trace the source of that assertion, and to ascertain its incorrectness." He goes on to quote Dr. Pusey's volume on the Royal Supremacy, p. 202, then lately published, in which it is stated that, until 1639, "the name of any civil judge is found only in one Commission out of forty." Lord Harrowby then says, that the author "quotes at the bottom of the page, as his authority for the words he has given in inverted commas, 'Gibson's Codex,' p. xxi. "But, oh!" he continues, "the good faith of controversialists! My Lords, I look to the passage referred to, and I find, 'There are no footsteps of any *nobility or common-law judges* in Commission,' &c."

few years of this period. But for the last twenty years of it we have full information in the repertory-book of the Court of Delegates.[1] During those twenty years there were 1080 appeals in Ecclesiastical causes. The Court was composed in

[1] The Registry of Appeals contains the following Records of the Court of Delegates, which have been carefully examined with a view to this work by Mr. J. G. Smith of the Admiralty Registry.

(I.) *Delegates' Act Books* or *Assignation Books.*—These contain Minutes, entered in order of date, of the proceedings before the various Commissioners, or Delegates appointed *pro istâ vice* to hear each Appeal. Each Minute records one of the steps in the proceedings, and gives the names of the Delegates then present.

Of these "Act Books" or "Assignation Books," there is a regular Series commencing in 1601, and, except a break of about ten years, from 1640 to 1650, continuing down to the abolition of the Court.

One Volume only has been found of an earlier date; viz. from 1538 to 1544, and this would seem to have been transcribed in the 17th century, from earlier records now lost.

Both this and the Act Books of the 17th century have been much damaged in past years, and are often very difficult to decipher.

(II.) *Delegates' Processes.*—The Process in each case contained a copy of all the minutes, evidence, and other documents in the Cause, up to the time of the Appeal, on the commencement of which the Process was transmitted to the Delegates from the Court below.

The earliest of these Processes is dated 1609, but, compared with the number of the Appeals, there are very few Processes remaining anterior to the Restoration. They were strongly bound a few years ago, and are in good condition.

(III.) *Repertory Books.*—These contain a list of the Appeals of all kinds in order of date. They give the Title of each Cause and the names of all the Delegates appointed by the Royal Commission to hear it, together with a copy of the "Quorum Clause" in each case, *i.e.* the Clause of the Commission which stated how many of the Delegates must be present at the ordinary proceedings, and how many (which varied in different Commissions) when sentence should be pronounced. They also state from what Court the Appeal had come, and occasionally a note is added to show the nature of the decree appealed from.

The earliest of these books commences in 1619. They are continued regularly until 1789, when the list abruptly terminates; but between those dates they seem to be almost, if not quite, complete, and show clearly how the Court was constituted.

Besides the books already mentioned, there is a large number of loose papers and parchment documents connected with Appeals to the Delegates. Among these are many "*Commissions of Appeal*," *i.e.* the Commissions issued by the Crown out of Chancery, under the Great Seal, appointing by name the Commissioners or Delegates for the hearing of the several Appeals. These date from about the year 1650. The Commissions are engrossed on parchment, but generally much defaced. The other documents are mostly instruments, or copies of instruments, issued during the progress of a suit.

The books containing the *processes* have lately been removed to the Record Office, in Fetter Lane. All the other documents mentioned in this note are at the Admiralty Registry, at Doctors' Commons.

872 cases of civilians only, in 2 cases[1] of Bishops only, in 24 cases of bishops and civilians together, without peers or Common-Law Judges. On the other hand, in 110 of the Commissions, Judges alone are named with the civilians; in 59, Judges, with Bishops, and civilians; and in 13, temporal peers are found with the civilians and with either Judges or Bishops. In the place, therefore, of Bishop Gibson's assertion, that the nobility or Common-Law Judges were present in no more than 1 Commission out of 40, we have the fact that they were present in 182 Commissions out of 1080, viz. rather more than 1 in 6, and, in more than 1 case out of 10, they formed the only element in the Court besides the civilians. On the other hand, the Bishops were present in about 90 Commissions out of 1080, viz. 1 in 12, and in but 24 of these cases, viz. 1 in 45 of the whole number of appeals, were they alone with the civilians.. The civilians were present in all but 2 Commissions, and in more than 4 cases out of 5 composed the whole Court.

We now turn to the first period, as to which we have not such trustworthy information. The only evidence cited by Bishop Gibson, besides a general reference to the records of the Delegates, is the quotation from the "Reformatio Legum," compiled by the Commission of thirty-two persons appointed in the reign of Edward VI. in accordance with the intention of the Statute 25 Henry VIII. c. 19,[2] but

[1] Leslie *v.* Ainger, and Aisgill *v.* Archbishop of Canterbury. The latter was a question as to the right of patronage.

[2] Froude's account of this Commission is as follows :—

"The sudden emancipation from the control of the Church Courts had led to license, and both the religious parties desired alike a restoration of discipline. On the 14th of November the bishops presented a complaint in the House of Lords that their jurisdiction was despised and disobeyed, that they could cite no one and punish no one; they could not even compel those who were disinclined to appear in their places in church. The peers listened with regret, and the prelates were invited to prepare a measure which would meet the necessity. After four days they produced something which to them was satisfactory; but it was found to savour too strongly of their ancient pretensions. The motion led only to the reappointment of the Commission of thirty-two, who were long before to have reformed the Canon Law; and the fruit of their exertions, when at last it seemed to have acquired vitality, dropped to the ground unripe. The time was passed when the English laity would submit their private conduct to ecclesiastical discipline, whether it was Catholic or whether it was Genevan."—Vol. v. p. 259. See also Reeve iv. 542.

which never passed into law :—"Quo cum fuerit causa devoluta (*i.e.* to the King) eam vel Concilio Provinciali definiri volumus, si gravis sit causa, vel a tribus quatuorve episcopis a nobis ad id constituendis."

It may, indeed, be inferred that the recommendations of this Commission represent the opinion which would have actuated the advisers of Edward in the appointment of Delegates, but this is a very slender foundation on which to build. We may at once set against the assertion of Bishop Gibson the counter-assertion of a contemporary writer, the editor of Watson's "Clergyman's Law" (third edit. 1725, p. 56). That writer, after quoting the passage from the "Reformatio Legum," goes on to say—"But, as that book was never established by any legal authority, so the practice has been all along to have lay judges joined in that Commission with ecclesiastics; though a Right Rev. Prelate has lately asserted it to be but a modern practice, viz. only from the year 1639—*a gross error*." Dr. Watson's assertion, as we shall see, is the better grounded. But it is not by assertions, or inferences from the supposed intentions of public bodies, that the matter can be settled. The only real information on such a subject is that which is at least as accessible to us as to Bishop Gibson, viz. the recorded facts as to the formation of such Courts of Appeal.

In the case of Lambert,[1] who was accused of false doctrine relating to the Sacrament in 1538, and, being condemned by the Archbishop's Court, appealed to the King (probably under the Statute 25 Henry VIII. c. 19), the King in person heard the cause in Westminster Hall, but the whole of the peerage, lay and spiritual, and the twelve judges, sat as assessors. Whether or not this can be taken as an actual precedent for the cases which we are considering, it certainly seems to show that temporal peers and common-law judges are not likely to have been excluded in the trial of cases of doctrine on appeal to the King.

The actual records of the Delegates to which Bishop Gibson refers as his sole authority are, so far as relates to this period, very scanty. A book, however, of Minutes has been found

[1] Froude, vol. iii. p. 339.

recording the proceedings in the years 1538—1544. In these the Commissions are exclusively composed of civilians. It is true there is no "footstep" (to use Bishop Gibson's term) of temporal peers or common-law judges, but neither are there any footsteps of Bishops or other dignitaries of the Church.

We find in the reign of Mary, on the reconciliation of the kingdom to Rome,[1] the legislative condemnation of the acts of the Judges Delegates, as proceeding by lay authority.[2] But these judgments, "even the judgments of laymen upon spiritual matters,"[3] are confirmed by this Act, and the mode of proceeding in cases in which condemnation had been passed for adherence to the Roman Catholic system, was to issue Commissions of Review. There are several such Commissions existing in the Record Office, issued to mixed Courts partly of laymen partly of ecclesiastics. Burnet states that he had seen the Commissions for restoring Bonner and Tunstal. "The Commission for Bonner," he says,[4] "bears date August 22d, 1553, setting forth that he had petitioned the Queen to examine the appeal he had made from the Delegates that had deprived him."[5]

[1] Phil. & Mary, c. 8, sec. 33.

[2] "Qui auctoritate laicali procedebant." This is quoted in the Index to Gibson's Codex in these words: "The judgments of Delegates censured as the judgments of lay authority in spiritual matters." It is possible, however, that the "Delegati" may mean no more than lay chancellors, or others, to whom Bishops delegated their functions, according to the Act 37 Hen. VIII. c. 17.

[3] "Processus coram quibusvis Judicibus, etiam laicis, super materiis spiritualibus habitos."

[4] Hist. Ref. ii. 494.

[5] From this Commission, which is now in the Record office, it appears that the Commissioners or Delegates by whom Bonner had been deprived in the reign of Edward VI. were the following:—

Thomas, Archbishop of Canterbury.
Nicholas, Bishop of Rochester.
Thomas Smyth, Knight, one of the principal Secretaries of the King.
William Maze, Dean of St. Paul's. And
William Petre, Knight.

Two therefore of the Commissioners were laymen.

Again, on the commission granted by Mary for Bonner's restoration, there is the following endorsement, with the names of the Commissioners appointed by her.

"A Commission to certain noblemen, gentlemen, and others learned in the

Bishop Gibson's statement, however, does not seem to be well founded, even so far as it asserts that there is no *record* of the presence of the Common Law Judges during this period. In Coveney's case (referred to by Dr. Watson),[1] in 1561, an appeal having been made by the Warden of Magdalen College, Oxford, to the Queen in Chancery from a sentence by the Bishop of Winchester, as Visitor of the College, the appeal was committed to two Judges joined apparently with some civilians. They resolved that the appeal did not lie; but their appointment shows that the common-law Judges were not excluded from such Commissions. And this is, so far as is

laws, for the examination and decision of the causes of appeal and complaint of Edmund Bonner, Bishop of London.,

"STN. WINTON."

William, Marquis of Winchester.
Henry, Earl of Arundel.
Edward, Earl of Derby.
Francis, Earl of Shrewsbury.
Robert Suthwell, Richard Suthwell, Edward Carne, Richard Reade } Knights.
William Roper, John Tregonwell } Esquires.
Gilbert Bourne, Archdeacon of Bedford.
David Poole, LL.D., Archdeacon of Derby.
Antony Draycot, LL.D., Archdeacon of Huntingdon.
William Cooke, Henry Cole, Geoffrey Glyn } LL.D.
William Amysted, Canon of St. Paul's and President of the Chapter.
Maurice Griffith, Archdeacon of Rochester.
John White, Warden of St. Mary's College, Winchester.

[1] Dyer, 209.—MICHAELMAS TERM. 3 AND 4 ELIZABETH.

"Memorandum, That this Term one Coveney, President of Magdalene College in Oxford, made an appeal to the Queen in her Chancery, from the sentence of deprivation of the Bishop of Winton, founder of the said college, the Visitation of which (for the good government of the House, and according to the statutes and constitutions there) belongs to the Bishops of Winton, and exempt from every Ordinary, &c. And the discussion of this appeal was committed to Browne Justice and Watson Justice, who, after divers conferences with the civilians, resolved that the appeal does not lie, and that he has no remedy as the laws are at this day, because the case is out of the statute of 24 Hen. VIII. c. 12, and does not observe the order of the statute, &c. for this matter of deprivation is merely temporal, and as by a lay patron."

Also, "that if he be so expelled, he may have an Assize or such suit at the Common Law."

This Case is also quoted by Coke (4 Inst. 337), who speaks of Coveney as "President of New College."

known, the only evidence extant as to the composition of the Court of Delegates during the reign of Queen Elizabeth.

Thus it appears that such records as exist for the early history of the Court of Delegates afford no countenance to the opinions which seem to have been very generally received on Bishop Gibson's supposed authority, that Ecclesiastics alone, or almost alone, composed the Court of Appeal in the latter part of the 16th century.

Upon the re-establishment of the Ecclesiastical Courts in 1660, what Bishop Gibson calls "the Rule of Mixture," prevailed for all causes alike, not only matrimonial and testamentary, but also those of a more spiritual character.[1] The essential and invariable element in the Court were the civilians. To these, in all causes of importance, Common-Law Judges[2] were added. The Bishops also were, at first, more frequently present than before, being on one Commission out of five up to 1700. And in a few notable cases temporal Peers were added to form a "full Commission."

It would seem, however, that before the middle of the eighteenth century, there had been a change in the practice, Bishops, like Peers, being rarely placed in the Commission;[3]

[1] A few cases may be given as instances :—

1663. Nicholls *v.* Nicholls; Testamentary. Three Bishops, three Judges, Five Doctors.

1664. Slader *v.* Smallbrooke; a suit against a clergyman for various offences, including incontinence, magic, and treason. Three Bishops, three Judges, one D.C.L., and the Judge of the Prerogative Court.

1690. Vaughan *v.* Jackett; Matrimonial. Two Bishops, three Judges, four Doctors.

1692.—In Salter *v.* Davis, described in the Catalogue of "Delegates' Processes" as "A suit against Davis, Vicar of Penn, Buckinghamshire, for omitting to read, &c., as required by Law, the Thirty-nine Articles, for preaching in favour of Popery, and for neglecting Cure of Souls in that Parish, together with other Offences,"—all the proceedings would seem, from the minutes, to have been taken before civilians only, without either Bishops or Common-Law Judges; but three Bishops and three Judges were in the commission.

1700. Lucy *v.* Watson; appeal from the Archbishop of Canterbury's sentence of deprivation on the Bishop of St. David's. Six Bishops, five Peers, five Judges, three Doctors, the Admiralty Judge, and a Master in Chancery.

1713. Whiston's case. Heresy. Six Bishops, three Judges, five Doctors.

[2] The Common Law judges sat in, at least, two out of three of the Ecclesiastical Appeals from 1660 to 1703, and after 1703 were always present.

[3] A Report is given in "Atkyns' Chancery Reports," vol. iii. p. 798, of an

from the date of the judgment of Lord Hardwicke, in Helyar's case, 1754, there have been found only five appeals on which Bishops sat as Delegates. The last of these was Harford *v.* Morris (1781), a Matrimonial suit, when the Commission consisted of one Archbishop, two Bishops, three Peers, three Judges, three Doctors. It is remarkable that in the case of Havard *v.* Evanson,[1] in 1777,[2] (one of the three cases

application made in Chancery on the 30th April, 1754, *ex parte* Helyar, in Appeal from a Sentence of the Prerogative Court in the case of Helyar *v.* Helyar (Lee's Reports, by Phillimore, vol. i. p. 472). After stating the question at issue, the Report proceeds :—

"A Petition was preferred to the Lord Chancellor on the part of the principal Defendant in that Cause, for a full Commission of Delegates, and also a Cross-Petition, praying that the Commission may issue to Judges of the Common Law and Civilians only.

"Lord Chancellor" (Hardwicke) :

"It is in the discretion of this Court whether they will grant a Commission of Delegates to Judges of the Common Law and Civilians, or to them and the Lords Spiritual and Temporal.

"I have granted a full Commission where the jurisdiction of Bishops is in controversy, or any question is depending that concerns the Canon and Ecclesiastical Law.

"The principal intention in granting full Commissions is, where legal and Ecclesiastical matters come in question ; and in order to balance the objection to one law more than to the other ; and to obviate this, the Judges in both were appointed.

"The present matter is upon the point of a Will, and altogether a question of Law, and therefore I shall dismiss the petition of the party appellate, and, according to the prayer of the Cross-Petition, direct a Commission of Delegates to Judges and Civilians only."

[1] In the Catalogue of Delegates' Processes, the Case of Havard *v.* Evanson is thus described :—

"The Office of the Judge was promoted in the Consistory of Gloucester, by Havard and another, against Evanson, Vicar of Tewkesbury in that diocese, for Reformation of his Manners, &c., especially for depraving and impugning the Liturgy and Articles of Religion, &c., for not using the prescript Form of Divine Service, &c., for maintaining Doctrines repugnant to the Thirty-nine Articles, &c., and for other Irregularities and Excesses. *Vide* the Articles, fol. 175, 250 ; annexed to which is exhibited a Pamphlet, charged to have been written by Evanson, entitled 'The Doctrines of a Trinity, and the Incarnation of God, examined upon the principles of Reason and common sense, &c.,' which is transcribed entire into the Process."

[2] All those named in the Commission, viz. three Judges and five Doctors, were present at the opening of the case ; but Sir William Blackstone seems to have been the only Judge who (with the Civilians) took part in the subsequent proceedings.

This suit was instituted against Evanson (for Heresy, &c.) by Havard, in the Consistory Court of Gloucester. The Judge of the Consistory Court having admitted certain Depositions against Evanson, he appealed to the Court of

returned in the Parliamentary paper of 1850,) though it was directly a case of heresy, no Bishops were in commission, but only Common-Law Judges and civilians. The last record of a Bishop in any commission is the name of the Bishop of London, in a Commission of Review, in the year 1798.

The true inference from these facts would appear to be that in the Court of Delegates, besides the civilians who were in all but one or two commissions, there were, during the first seventy years of its existence, sometimes probably ecclesiastics, sometimes Common-Law Judges; that in the time of James I. and Charles I. Bishops were occasionally added, but more often Common-Law Judges; that for the first fifty years after the Restoration, there were most usually Common-Law Judges in the Commissions, and often Bishops; but that gradually the Bishops were withdrawn, while the Judges became an integral part of the Court.

VII.

In the year 1830, a Royal Commission was issued for the purpose of making full inquiry into the course of proceeding and jurisdiction of the Ecclesiastical Courts, and of recommending any alteration which the Commissioners might think desirable. On this Commission, besides the names of eminent Judges of the Civil and Common Law,[1] were those of the Archbishop of Canterbury (Howley), the Bishops of London (Blomfield), Durham (Van Mildert), Lincoln (Kaye), St. Asaph (Carey), and Bangor (Bethell). In the beginning of 1831

Arches, which reversed the decision of the Court below, suppressed the Depositions, and dismissed (*i.e.* acquitted) the Defendant Evanson. From this Decree Havard appealed to the King in Chancery, and the Court of Delegates confirmed the decree of the Court of Arches as to the suppression of the Depositions, or at least the more material of them; but instead of confirming the dismissal of the Defendant Evanson, retained the cause for further hearing. It seems, however, that Havard found it useless to go on with the prosecution after the rejection of the Depositions, and accordingly he renounced the Appeal, and the case ended.

[1] Lord Tenterden (Chief Justice), Lord Wynford, Sir N. Tindal (Chief Justice of Common Pleas), Sir W. Alexander (Chief Baron of the Exchequer), Sir J. Nicholl, Dean of the Arches, and Sir C. Robinson, King's Advocate, Sir. H. James, Sir C. E. Carrington, Dr. Lushington, and Mr. Fergusson.

these commissioners were requested, by a communication from the Lord Chancellor (Lord Brougham), to report specially and immediately on the jurisdiction of the Court of Delegates, and the expediency of transferring that jurisdiction to the Privy Council. The general Report was not presented till February 15th, 1832. It contains a full account of the Ecclesiastical Courts, and deals, amongst other matters, very thoroughly with the questions connected with "the Correction of Clerks in Holy Orders," making elaborate recommendations, many of which were subsequently embodied in the Church Discipline Act of 1840.

The portion of the Report which deals with cases of this kind commences thus:—[1]

"Our notice has been first attracted to that branch of it [the jurisdiction of a criminal nature' possessed by the ecclesiastical courts] which embraces the *correction of clerks*.[2] It is most fitting that there should exist some tribunal to which the clergy should be amenable for any open violation of morality, or disregard of the sacred obligations into which they entered on becoming ministers of the Church of England; but we have had the satisfaction of finding that, for many years last past, the instances have been very rare in which it has been necessary to resort to judicial proceedings for the purpose of punishing offences committed by them."

A little later, speaking of the inquisitorial process introduced in old times into the general exercise of ecclesiastical jurisdiction, the Report quotes the preamble of the Statute of 1534 against Heresy, and speaks of the *ex officio* oath, and the effect upon ecclesiastical discipline of the Court of High Commission, which dealt with matters of doctrine at least as much as with those of discipline. There can, indeed, be no doubt that all the commissioners were well aware that charges of false doctrine were one principal part of the subject of the Correction of Clerks with which they dealt so

[1] P. 53.

[2] Earlier in the Report this portion of the subject is thus alluded to: "The third class includes Church discipline and the Correction of Offences of a *spiritual* kind. They are proceeded upon in the way of *criminal* suits *pro salute animæ*, and for the lawful correction of manners. Among these are offences committed by the clergy themselves, such as neglect of duty, immoral conduct, advancing doctrines not conformable to the Articles of the Church, suffering dilapidations and like offences." (P. 13.)

largely; and, although cases of doctrine had not been frequent in the years immediately preceding the Commission, yet the celebrated judgment of Lord Stowell in the case of Mr. Stone, in 1809, could not have been forgotten by those who in 1831 recommended the transfer of the Appeal to the Privy Council. Indeed, it may well be asked for what purpose six bishops were placed in the Commission, except that of attending to the questions connected with the professional obligations of the Clergy.

The Special Report of the Commissioners recites the issue of the Commission, and the question addressed to them by the Lord Chancellor, with the answer which they had thought it right to give, viz.—

"That it would be expedient to abolish the jurisdiction hitherto exercised by judges delegate, and to transfer the right of hearing appeals to the Privy Council; provided that, in order to render that tribunal efficient for such purpose, a sufficient number of days for the sitting of the Privy Council be fixed, and some arrangement made for the attendance of Privy Councillors conversant with legal principles; and further, that the present proceedings for a Commission of Review ought to be abolished."

The Commissioners then proceed to give their reasons for the proposed change, which are as follows:—

"The formation of the Court of Delegates, as a Court of ultimate Appeal in Ecclesiastical Causes, under the Statute passed in the 25th year of King Henry the Eighth, in lieu of the ancient form of Appeal to Rome, may be well suited to effect the object of keeping the administration of the Ecclesiastical Laws in due observance of the Common Law of the Realm:—But it presents anomalies, which have been pointed out by all the witnesses who have been examined by us on this head of inquiry, and which appear to have been always considered as defects, and were made the subject of representation to the Crown in Petitions, for their amendment, in the reign of Charles the Second, though without effect.

"The Court is constituted for each separate Case, by Commission, under the Great Seal, to certain persons delegated thereby to hear and determine the particular Cause. In ordinary cases, the Delegates are three Puisne Judges, one from each Court of Common Law, and three or more Civilians; but in special cases, a fuller

Commission is sometimes issued, consisting of Spiritual and Temporal Peers, Judges of the Common Law, and Civilians, usually three of each description.

"In case of the Court being equally divided, or no Common-Law Judge forming part of the majority, a *Commission of Adjuncts*[1] issues, appointing additional Judges of the same description.

"The decision of the Court of Delegates is final, no further Appeal lying as matter of right; but a Petition may be presented to Your Majesty in Council, for a *Commission of Review*.[2] This Petition is referred to the Lord Chancellor, who, after hearing Counsel on both sides, advises your Majesty thereon.

"On this description of the constitution of the Court of Delegates, we feel bound to observe, that a Special Commission being required in each case, some additional expense and delay are thereby incurred. The Judges in each case being different, the uniformity of decision is not so well preserved; and it not being the practice

[1] In a testamentary case in 1815-16, Henshaw and Hadfield *v.* Atkinson and Atkinson, no less than three commissions were successively issued, the Judges being three times equally divided. (Lee's Reports by Phillimore. Vol. I. p. 240).

[2] The following extract from a note in Vesey's Reports (iv. 211) describes "the practice in this very rare proceeding:"

"The Petition of Appeal is addressed, not to the King in Chancery, but to the King's most excellent Majesty in Council. It states briefly a naked case of facts, and the sentence of the Court of Delegates; and that by such sentence the Petitioner thinks himself aggrieved. It then proceeds to pray, that His Majesty would most graciously be pleased to grant a Commission of Review to rehear, reconsider, and determine the said cause, directed to such Lords Spiritual and Temporal, and Judges of the Common Law, and Doctors of the Civil Law, of this Realm, as to His Majesty in his great wisdom shall seem meet, with the usual clause of *Quorum*.

"An order then issues from the Council to the Lord Chancellor, to inquire into the merits of the Petition, and report his opinion to His Majesty.

"In consequence of that order the Lord Chancellor hears the parties by Counsel, including Civilians, and makes his Report to His Majesty" (in the form of a Certificate), "whether it will be reasonable and proper for His Majesty to grant a Commission of Review according to the Prayer of the Petition. If the Report is in favour of the Petition, an order issues from the King in Council, directing the Lord Chancellor to cause such Commission to be prepared in the usual manner under the Great Seal. The Commission is directed to new Delegates, including Lords Spiritual and Temporal, Judges of the Common Law, and Doctors of the Civil Law; and in order to make a final decree or sentence, one at least of each class is directed by the Commission to attend." [This last direction seems to have been what was contained in "the usual Clause of *Quorum*," mentioned above.] Blackstone speaks of the Commission of Review as being "not a matter of right which a subject may demand, *ex debito justitiæ*, but merely a matter of favour, which therefore is often denied." B. iii. c. 5.

of the Court to deliver or explain the grounds of its judgments, the principles on which they are founded are not sufficiently ascertained.

"With respect to the Common Law Judges, notwithstanding their great learning and experience in the Law of their own Courts, and the great attention and diligence with which they have always discharged their duties, they must occasionally, perhaps not unfrequently, rely for the Law of the Ecclesiastical Court on the Civilian Condelegates; who, in consequence of the Principal Advocates being chiefly engaged as Counsel, are often Junior Advocates, and are thus frequently appointed to act as Judges of Appeal before they have had any considerable practice or experience in their profession.

"The system of appointing Advocates to act as Judges is liable, perhaps, to a still more general objection in principle; namely, that being Advocates, their opinions and judgment upon the case before them may be in some degree biassed, however unintentionally, by the bearing which the decision may have upon similar causes in which they may be then engaged as Counsel. The division of opinion of a Court so constituted being known, becomes a ground of dissatisfaction to suitors, and encourages applications for Commissions of Review. Commissions of Adjuncts, if necessary, and Commissions of Review, if granted, are attended with the expenses and delay of Rehearing, and must be productive of great inconvenience.

"There being no permanent Court, but each Commission being limited to the particular case, no general orders and regulations can be made for expediting the course of proceeding, or establishing rules of practice.

"These reasons, which may possibly be further elucidated in our General Report, by considerations growing of the matters there to be discussed, have induced us to think that the constitution of such a Court is essentially defective: and though we might have found difficulty in proposing an unobjectionable substitute, if our attention had not been directed to the expediency of removing that Jurisdiction to the Privy Council, we have no hesitation in assenting to that proposition, subject to the adoption of such suitable regulations and provisions as we have before suggested for rendering that Tribunal efficient for such purpose.

"It appears to us, that an Appeal to the Privy Council would not be attended with the objections and inconveniences above enumerated.

"The Privy Council, being composed of Lords Spiritual and Temporal, the Judges in Equity, the Chiefs of the Common-Law Courts, the Judges of the Civil-Law Courts, and other persons of legal education and habits, who have filled judicial situations, seems to comprise the materials of a most perfect tribunal for deciding the Appeals in question: and although it would be premature at the present moment to lay down any certain or inflexible rule, by which the constitution of such Court should be governed in the appointment of its members, yet it may well be observed, that the union in one Court of Appeal, of a Judge in a Court of Equity, a Judge of one of the Courts of Common Law, and a Judge of one of the Courts of Civil Law, whilst it follows the principle on which the present Court of Delegates is constituted, avoids, at the same time, many of the inconveniences above pointed out, and brings with it the promise of many advantages peculiar to itself.

"It is further to be observed, that this tribunal is always in existence, and does not require a Special Commission in each case, but only a general authority, similar to that given for the hearing of Appeals in Prize Causes.

"It is usual at the Privy Council for the presiding Law Lord to deliver the grounds of the judgment; which, being thus known and reported, tend to settle principles, and to establish uniformity of decision.

"The necessity of applying for Commissions of Adjuncts, or of Review, would no longer exist; as any doubt felt by the Court might either be removed by conferring with other Members of the Board, not present at the hearing, or, at the utmost, by a re-hearing.

"No new arrangement of registrars, or other officers, would be necessary: the Appeals would be prosecuted in the same manner as Prize Appeals. The Registry of the Delegates and of Prize Appeals is already one and the same; and the subordinate proceedings, preparatory to the hearing, would be conducted by Surrogates, as in Prize Appeals.

"The exercise of this jurisdiction by the Privy Council would be no anomaly, for in testamentary and other ecclesiastical matters arising in the Colonies the ultimate appeal is to your Majesty in Council.

"The number of Appeals is not likely to be onerous, since the whole number from both the Provinces to the Delegates for the last thirty years have been only ninety-five, which gives an average

of little more than three in the year; and although, from the great increase of personal property, the number, of late years, has rather increased, yet, taking the average of the last ten years, they do not quite amount to four in the year; while, from the greater expedition in the hearing, and more uniformity in decision, it may be hoped that the number would rather be diminished than increased, more especially if, by regulations which might be found expedient, checks could be given to Appeals from *grievances* in intermediate steps in the cause, and still more so, if decisions upon questions of fact should be rendered more satisfactory and conclusive, most Appeals being rather upon the facts of the case, than upon any point of law.

"The Court of Privy Council, being always in existence, would have the power of making orders and regulations for expediting causes, and for correcting any inconveniences in the course of proceedings and of practice."

The recommendation thus made by the Commissioners, that the Privy Council should be made a Court of Final Appeal in Ecclesiastical cases, was strictly in conformity with what may be termed the historical development of the Privy Council.[1] That body—or, to use the stricter and more accurate term, the King in Council—has always been, from the earliest period of the English Monarchy, the seat, as it were, of the Royal prerogatives. All the ultimate rights of the Crown—all the indefinite powers which are supposed, in theory, to reside in the Sovereign—have always been exercised by the King with the aid of advisers; in other words, of the Privy Council, which is nothing more than the body of advisers, whoever they may be, on whom the King may call for counsel, and who, as a matter of fact, though this is not theoretically essential to their position, are bound by an oath to perform their duty as loyal Councillors of the Sovereign. The claim to hear final appeals in matters Ecclesiastical, being pre-eminently one of the original prerogatives of the Crown, is, as such, naturally exercised by the King in Council. Indeed, from the earliest periods of history, the Privy Council, of which Ecclesiastics have always formed a more or less con-

[1] See the Arnold Essay for 1860 on the Privy Council, by Mr. A. V. Dicey, Fellow of Trinity College, Oxford, who has supplied the information from which this and the following paragraph have been written.

siderable part,[1] has exercised a supervision over Ecclesiastical matters. In the few published records of its proceedings, which refer chiefly to the reign of Henry VI., may be found traces of its dealing with heresy, and with what, in that age, would be an Ecclesiastical offence—sorcery. The Council, moreover, not only kept a jealous eye on the distribution of bulls, but intervened in minor Ecclesiastical matters, which might have been supposed, in the middle ages, to belong especially to the province of the Church or the Pope. Thus, monks who wished to change their order, craved permission to do so of the Crown, through the Council.

The essential peculiarity of the Privy Council is what may be termed the indefiniteness of its constitution. Being not an organized body, but simply an assemblage of all the advisers of the King, it has at no time acted in collective union. Many of our institutions—such, for example, as the Court of Chancery, and the ordinary Law Courts—were, historically, Committees of the Council, which gradually took a permanent form; and even that body which would be described simply as the Privy Council, has always acted through Committees selected out of the whole number of Councillors. This peculiarity of the Privy Council admirably fits it for discharging the functions of a Court of Appeal. It has always been the Court of Appeal for Colonial cases; and it is the Court to which resort would naturally be proposed in a case in which no other Court was specially provided. Any persons whose position or learning makes their presence as Judges in such a Court desirable, may (except as limited by Statute) be summoned; and the constitution of the Court can easily be modified, with a view to bringing together those persons who are best qualified to decide on any special class of cases. Nor are the arrangements actually made by the Statutes of William the Fourth, for the hearing of appeals by the Judicial Committee, in any sense alien from the ancient constitution of the Council. Its history shows that, in thus acting through subdivisions of its body, it preserves its traditional character and mode of action.

[1] The two Archbishops claim a prescriptive right to act as Councillors.

Lord Brougham, in introducing the Bill for the transference of the Appellate Jurisdiction, described in the following terms the Court for which the Privy Council was about to become the substitute:[1]—

"The Crown might issue this commission (of delegates) to whatever persons it pleased, but it had been long the practice to issue that commission to a certain description of persons. Those persons were generally three or four of the Judges in the Courts of Common Law, and three, four, or five Civilians. The construction of that Court was anything but well adapted for the performance of the important duties that were assigned to it. It was first required by the rules of the Court that, in order to make its sentence valid, one of the Common Law Judges should be a consenting party to it. In the second place, when an equality of decision occurred (an occurrence by no means unfrequent in this Court, where there were often but six of the Judges in attendance), there was no sentence. In the third place, the Common Law Judges, who constituted a part of this Court, were obliged, in forming their judgment in the case referred to them, to rely on the assistance of the advocates of the Civil Law Courts, who had been appointed in the same commission, and who were, of course, considered to be more conversant with those principles of law on which the case was to be decided than they could be. Now it so happened, that the Civilians appointed on those commissions were not the best qualified to render that assistance to the Common Law Judges, or to bear a part in the decisions of this Court, for they were practising advocates in the Courts below, before those very Judges from whose sentence the appeal in question was made. This was in itself manifestly a great evil, and a practice that was highly objectionable; for, however learned those gentlemen might be, and however honourable and equitable their decisions might be, no man should be placed in a situation like this, one day acting as practising barristers in the Court below, and the very next day called from that Bar to decide upon points exactly similar to those which they had been arguing before the Judges in that Court from whose decision the appeal had been made. Another objectionable feature in the constitution of this Court was that, in the selection of the Civilians to sit upon it, they were extremely limited in their choice; they could not, of course,

[1] Hansard, vol. xiv. 78, 79.

select the Judges; they could only choose from amongst the advocates in those Courts which were not crowded with barristers, like the Courts of Westminster Hall; and as most, if not all, of the most eminent of those advocates had been employed in the cause in the Court below, they of course could not be appointed to decide upon an appeal in a cause in which they had been engaged as counsel. The natural tendency of such a state of things was, that this appeal from the Court below was sent for decision to Judges, composed, not even of the leading barristers in that inferior Court, but of the junior barristers, who had not as yet obtained any business, and of other barristers who, from accidental circumstances or otherwise, had got no practice at all. The result was, that frequently barristers of not more than one year and a half's standing were called on to preside in this Court of Appeal as Judges."

VIII.

The Act introduced by Lord Brougham in the words above quoted (2 & 3 Will. IV. c. 92) recites the provisions of 25 Hen. VIII. c. 19, by which the Court of Delegates was constituted for Ecclesiastical causes, and also the Act 8 Eliz. c. 5, which prohibited any further appeal from the decision of the Delegates in Admiralty causes; and, premising that, notwithstanding expressions in both these Acts, importing the finality of appeals to the Delegates,[1] yet that, from time to time, Commissions had been issued to review the decrees of the Court of Delegates; repeals the Statute of Elizabeth, and so much of that of Henry VIII. as gives power to appeal to the King in Chancery.

It then provides that every one who would have appealed to the King in Chancery under the repealed acts, may appeal to the King in Council, and that the King in Council shall

[1] Viz. in the former Act, that the sentence should be "good and effectual, and also definitive, and that no further appeals should be had or made from the said Commissioners for the same." And in the latter that it "should be final, and no further appeal should be made from the said judgment or sentence definitive." Blackstone states that the Appeal to the King in Chancery from the Admiralty Courts always lay. Commentaries, B. iii. c. 5.

have power to hear and determine such appeals as would have been done before by the Court of Delegates; and that the judgments of the Privy Council shall have the same force as those of the Delegates, but that their decree shall be final, and not subject to a Commission of Review.[1]

On the introduction of this measure, it was stated by Lord Brougham that, in the ensuing year, further provision would be made for the discharge of the judicial functions of the Privy Council. Accordingly, in the next year (1833), the Statute 3 & 4 Will. IV. c. 41, was passed, which by the following enactment constitutes the Judicial Committee:—

"That the president for the time being of his majesty's privy council, the lord high chancellor of Great Britain for the time being, and such of the members of his majesty's privy council as shall from time to time hold any of the offices following, that is to say, the office of lord keeper or first lord commissioner of the great seal of Great Britain, lord chief justice or judge of the court of King's Bench, master of the rolls, vice-chancellor of England, lord

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[1] The words are as follows:—"And be it further enacted, that from and after the said first day of February one thousand eight hundred and thirty-three, it shall be lawful to and for every person who might heretofore, by virtue of either of the said recited acts, have appealed or made suit to his majesty in his high court of Chancery, to appeal or make suit to the king's majesty, his heirs or successors, in council, within such time, in such manner, and subject to such rules, orders, and regulations for the due and more convenient proceeding, as shall seem meet and necessary, and upon such security, if any, as his majesty, his heirs and successors, shall from time to time by order in council direct; and that the king's majesty, his heirs and successors, in council, shall thereupon have power to proceed to hear and determine every appeal and suit so to be made by virtue of this act, and to make all such judgments, orders, and decrees in the matter of such appeal or suit as might heretofore have been made by his majesty's commissioners appointed by virtue of either of the hereinbefore recited acts if this act had not been passed; and that every such judgment, order, and decree so to be made by the king's majesty, his heirs and successors, shall have such and the like force and effect in all respects whatsoever as the same respectively would have had if made and pronounced by the aforesaid high court of Delegates; and that every such judgment, order, and decree shall be final and definitive, and that no commission shall hereafter be granted or authorised to review any judgment or decree to be made by virtue of this act."

chief justice or judge of the court of Common Pleas, lord chief baron or baron of the court of Exchequer, judge of the Prerogative court of the Lord Archbishop of Canterbury, judge of the high court of Admiralty, and chief judge of the court in Bankruptcy, and also all persons, members of his majesty's privy council, who shall have been president thereof or held the office of lord chancellor of Great Britain, or shall have held any of the other offices hereinbefore mentioned, shall form a committee of his majesty's said privy council, and shall be styled, 'The Judicial Committee of the Privy Council;' provided nevertheless, that it shall be lawful for his majesty from time to time, as and when he shall think fit, by his sign manual, to appoint any two other persons, being privy councillors, to be members of the said committee."

The jurisdiction and procedure of this new Court are regulated by the succeeding sections. These sections provide that all appeals to the Privy Council shall be referred to the Judicial Committee, who shall report thereupon, the nature of such report being stated in open court: that the Sovereign shall have power to refer to the Committee "any other matters whatsoever;"[1] that four members shall form a quorum; that the reports shall express the opinion of the majority, and that the Queen shall have the right of summoning other Privy Councillors to attend the meetings of the Committee.[2]

[1] By this provision the case of the Bishop of Natal has recently been referred to the Judicial Committee.

[2] The sections of the Act are as follows:—

"§ 3. And be it further enacted, that all appeals or complaints in the nature of appeals whatever, which, either by virtue of this act, or of any law, statute, or custom, may be brought before his majesty or his majesty in council, from or in respect of the determination, sentence, rule, or order of any court, judge, or judicial officer, and all such appeals as are now pending and unheard, shall, from and after the passing of this act, be referred by his majesty to the said judicial committee of his privy council, and that such appeals, causes, and matters shall be heard by the said judicial committee, and a report or recommendation thereon shall be made to his majesty in council for his decision thereon as heretofore, in the same manner and form as has been heretofore the custom with respect to matters referred by his majesty to the whole of his privy council or a committee thereof (the nature of such report or recommendation being always stated in open court).

"§ 4. And be it further enacted, that it shall be lawful for his majesty to refer to the said judicial committee for hearing or con-

There are also in this Act provisions for the attendance of the Common Law Judges, for taking evidence, and directing issues to be tried, for decreeing costs, and other matters of detail. Further regulations were made by 6 & 7 Vict. c. 38, and by 7 & 8 Vict. c. 69. The most important change, however, for our present purpose, which has been made since the first erection of this tribunal, is the provision in the Act 3 & 4 Vict. c. 86, which confirms the appeal to the Privy Council from the Archbishop's Court, and places upon the Judicial Committee all Bishops and Archbishops, being Privy Councillors, for any appeal under that Act; adding, that no such appeal shall be heard without the attendance of one Archbishop or Bishop.[1]

sideration any such other matters whatsoever as his majesty shall think fit, and such committee shall thereupon hear or consider the same, and shall advise his majesty thereon in manner aforesaid.

"§ 5. And be it further enacted, that no matter shall be heard, nor shall any order, report, or recommendation be made, by the said judicial committee, in pursuance of this act, unless in the presence of at least four members of the said committee; and that no report or recommendation shall be made to his majesty unless a majority of the members of such judicial committee present at the hearing shall concur in such report or recommendation: provided always, that nothing herein contained shall prevent his majesty, if he shall think fit, from summoning any other of the members of his said privy council to attend the meetings of the said committee."

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[1] The clauses are as follows:—

"§ 15. And be it enacted, that it shall be lawful for any party who shall think himself aggrieved by the judgment pronounced in the first instance by the bishop, or in the court of appeal of the province, to appeal from such judgment; and such appeal shall be to the archbishop, and shall be heard before the judge of the court of appeal of the province, when the cause shall have been heard and determined in the first instance by the bishop, and shall be proceeded in in the said court of appeal in the same manner and subject only to the same appeal as in this act is provided with respect to cases sent by letters of request to the said court; and the appeal shall be to the queen in council, and shall be heard before the judicial committee of the Privy Council, when the cause shall have been heard and determined in the first instance in the court of the archbishop.

"§ 16. And be it enacted, that every archbishop and bishop of the united church of England and Ireland, who now is or at any

It is important to observe that this Act was framed with the concurrence of the Bishops. The Lord Chancellor[1] in introducing it, expressed a hope that it would reconcile all differences upon the subject. The Archbishop of Canterbury, on the part of the clergy, gave his cordial approbation to the Bill; the Bishop of Exeter, also, entirely and heartily concurred in the measure.[2] There is no record of any debate upon the Bill, beyond a very few suggestions by independent members, in either house; and the acquiescence with which it was received on all sides, was doubtless owing to the agreement of the Bishops in supporting the measure. It seems clear, therefore, that the rulers of our Church at that time saw no reason to object to the Judicial Committee as a Court of appeal in matters of Ecclesiastical discipline, whether relating to faith or morals. It would be a serious reflection upon the character of men like Archbishop Howley and Bishop Blomfield and Bishop Kaye were it to be supposed that they were ignorant of the nature of a tribunal which they had themselves assisted in founding, or that they were careless of the interests with which they were now, after trial, entrusting it, or that they deliberately sanctioned an institution against which any objection of principle could be raised.

IX.

We have now before us the constitution of the Court; but a more distinct conception of its actual operation is requisite to a just estimate of its title to respect.

time hereafter shall be sworn of her majesty's most honourable Privy Council, shall be a member of the judicial committee of the Privy Council for the purposes of every such appeal as aforesaid; and that no such appeal shall be heard before the judicial committee of the Privy Council unless at least one of such archbishops or bishops shall be present at the hearing thereof; provided always, that the archbishop or bishop who shall have issued the commission hereinbefore mentioned in any such case, or who shall have heard any such case, or who shall have sent any such case by letters of request to the court of appeal of the province, shall not sit as a member of the judicial committee on an appeal in that case."

[1] Hansard, lv. 73. [2] Ibid. 74.

The Judicial Committee consists of the present and past holders of certain offices, together with two Privy Councillors appointed by Her Majesty at her pleasure, and (in cases under the Church Discipline Act) the Prelates who are Privy Councillors. It is evident that the judicial body thus formed will usually be large. The actual number of members at the present moment is twenty-two,[1] exclusive of the Prelates. It was, of course, never intended that the whole body should attend on any single occasion. The original act, therefore, provided that a quorum should consist of four, and this was reduced to three by 6 & 7 Vict. c. 38. In important cases, however, a larger number are summoned, the summons in each case being sent by the Lord President, acting on behalf of Her Majesty the Queen.

The Archbishops and Bishops who are Privy Councillors are members of the Committee only for the purposes of the Act 3 & 4 Vict. c. 86; viz. for the correction of clerks. Thus it will be found that, in the cases in which the judgments are given in this work, there are two at least even of those subsequent to the Church Discipline Act (viz. "Gorham *v.* Bishop of Exeter," and "Liddell *v.* Westerton") in which no Bishop or Archbishop sat as a member of the Judicial Committee. In these cases, however, the Archbishops and the Bishop of London were present by the command of the Queen,[2] and the Judgment was submitted to them before it was pronounced.

An appeal properly lies only from a definitive sentence, that is, one that is conclusive upon the merits of the case. The Act 3 & 4 Vict. c. 86, § 13, forbids the old practice of appeals at all stages of a proceeding, and leaves it in the discretion of the Judge of the Court of Arches to allow or disallow an appeal from an interlocutory order. Such an appeal is technically spoken of as "*a grievance*," since it alleges an incidental abuse of power by the inferior Court. It is usual to allow such an appeal only in cases in which the interlocutory decree seriously affects the merits of the case.

1 A list is given at p. lxxxi.

2 This command is given according to the provision of 3 & 4 William IV. c. 41, § 5, which gives the Sovereign the right to summon any member of the Privy Council "to attend the meetings of the Committee."

Thus Dr. Lushington, in "Heath *v.* Burder" (15 Moore's Privy Council Cases, 17) says: "Let me consider what would be properly the grounds upon which the Court ought to allow the appeal. I take them to be—first, a serious doubt upon any question of law; secondly, the gravity and importance of the case; thirdly, the novelty, where no express authority can be found; and fourthly, if it can be shown that it would be difficult to remedy the consequences of error in the Court below, if error there should be." But when such an appeal has been allowed, and the case has gone to the superior Court, that Court has power to retain the case before it so long as it considers necessary for the ends of justice. Indeed, it was the common practice in the Court of Delegates to retain the case whenever the sentence of the lower Court in an interlocutory decree had been reversed. The matter, however, is in the discretion of the Committee, who are usually very unwilling to keep the case before them. Thus in the case of "Head *v.* Sanders,"[1] in which a request was preferred by the Appellant that the case should be retained, it was stated in the judgment that, "the Privy Council was a Court of Appeal in the last resort, and their Lordships thought that such a court should not decide any cause in the first instance, as it ought to have the benefit of the discussion and judgment in the Court below, and there ought not to be an original judgment pronounced from which there was no appeal." In the case also of "Heath *v.* Burder,"[2] in which the interlocutory decree of Dr. Lushington relating to the sufficiency of the articles, as then brought in, was set aside, the Committee, under such circumstances, having the same power as the Court of Delegates to exercise original jurisdiction, thought it right to retain the case before them until the articles were brought to a satisfactory state; but, nevertheless, remitted the principal cause for hearing in the Court below. This privilege, therefore, of retaining the cause after judgment on appeal has been very seldom exercised and is rarely applied for.

The Statute 3 & 4 Will. IV. c. 41, provides (§ 5), that "no report or recommendation shall be made to His Majesty,

[1] P. 86. [2] P. 222.

unless a majority of the members of such Judicial Committee present at the hearing shall concur in such report or recommendation: provided always, that nothing herein contained shall prevent His Majesty, if he shall think fit, from summoning any other of the members of his said Privy Council to attend the meetings of the said Committee." A single joint report, therefore, must be made, and this necessarily supposes the possibility of some of the members of the Committee dissenting from the report. In one or two Ecclesiastical appeals, commencing with the Gorham case in 1850, in which such dissent has existed, it has been allowed to transpire, and has been stated in the judgment. But the rule of the Privy Council is laid down by a standing order of the time of Charles I. still in force, which expressly prohibits that any one "should publish how the voices and opinions went." And although the rule has been in certain cases broken through so far as to allow a statement of the fact that certain members dissented from the Judgment, yet no expression of the reasons for such difference has ever been made, nor would it be allowed. The fact, however, that but one report can be made, has a great effect upon the care which is taken in the preparation of the judgment in any case of importance, and adds to its weight when delivered, and the influence of dissentients is always felt in the expression of the judgment, if not in the actual decision.

The distinction between the formal report made to Her Majesty and the Judgment delivered in Court, is very material.[1]

The Statute 3 & 4 Will. IV. c. 41, § 3, requires that all appeals, or complaints in the nature of appeals, shall be heard by the Judicial Committee, and a report or recommendation thereon made to Her Majesty in Council for her decision, the nature of such report or recommendation being always stated in open Court.

The nature of the report or recommendation which is thus required to be stated in open Court, is in fact the judgment of the Judicial Committee on the law and merits of the case.

[1] The paragraphs relating to this point are given almost in the words of Mr. E. F. Moore, the reporter to the Judicial Committee, who kindly prepared a statement on the subject for this work.

If the appeal involves but a simple point, and depends on well-known principles of law, the application of which is clear and obvious, the opinion or judgment of the Committee is pronounced at once by one of its members[1]; but if, as is more generally the case, the questions at issue in the appeal are intricate and difficult, and require deliberation, it is usual for the Committee to take time to consider their judgment.

If dissatisfied with the argument on the hearing, the Committee direct a further argument on the whole, or such parts of the case as they require to be informed on, confining such second argument usually to one counsel on either side. Where, however, as is more usually the case, no such second argument is required, the Committee, after considering the nature of their report, depute one of their members to prepare a written statement of the grounds and reasons of their opinion; this, when so prepared, is submitted for the approval of each member of the Committee who was present at the hearing of the case; and, a day being fixed for its delivery, the opinion or judgment thus prepared is read in open Court by that member of the Committee who prepared it, unless he is prevented by some engagement or accident from being present, in which case the judgment is read or delivered by some other member of the Committee.

The opinion or judgment of the Committee having been thus delivered forms the basis, as it contains the reasons for the order to be made in the cause by Her Majesty in Council. The order is framed by the Registrar of the Privy Council; it is a formal document, reciting the reference of the original petition of appeal by Her Majesty to the Judicial Committee, the Court from whence, and the cause in which the decree or order appealed from was made, the appearance of the Respondent, and that the Committee, having in obedience to Her Majesty's order taken the same into consideration, and read the proceedings and evidence transmitted from the Court below, and heard counsel thereon, humbly report their opinion thereon (being in favour of or against such appeal and complaint), and that it ought to be declared, &c. Whereupon

[1] This was done in the cases of Langley *v.* Burder, and Shore *v.* Barnes,' of which an account will be found in this work, pp. 39 & 44.

Her Majesty having taken the said report into consideration, is pleased, by and with the advice of her Privy Council, to approve thereof, and to order accordingly. The order so made, and signed by the Clerk of the Council, is final and conclusive, being, in the language of the Statute, 'the decision of Her Majesty' in the appeal.[1]

There are a few leading principles which have been enunciated in the decisions of the Committee, and by which the Court may be considered to be bound. The most important and comprehensive of these are to be found in the judgments in cases of doctrine; viz. those of Mr. Gorham, Mr. Heath, and of Dr. Williams and Mr. Wilson.[2]

(1) In whatever form cases of this kind arise, both the party accused, and the Court before which they are brought, has a right to require that the doctrine of the Church alleged to be impugned, and the doctrine of the accused which is alleged to impugn it, shall be stated with sufficient distinctness to enable the one to frame his defence, and the other to discover what are the real points in controversy. (P. 217. See also p. 88.[3]) But, If a single distinct passage complained of contains a plain meaning, which can admit of no doubt, it may be sufficient to set it out, and to state that it is directly contrary and repugnant to such one or more of the Thirty-nine Articles as are conceived to be opposed to it. (P. 220.)

(2) After gaining a clear idea of the doctrines of the accused, the question which the Court has to consider is not whether these are sound or unsound, but whether they are contrary to the doctrines which the Church of England, by its Articles, formularies, and rubrics, requires to be held by its ministers. (P. 89.)

(3) The Court applies to the Articles and liturgy the same

[1] The Order in Council for the Gorham case, embodying the formal report of the Judicial Committee will be found at p. 105.

[2] The references are to the pages in this work. The decisions are given as nearly as possible in the words of the Judgments.

[3] In Heath's case, it was decided that the specification must include—first, the passages alleged to be unsound; secondly, a statement of the unsound doctrine contained in them; thirdly, the parts of the formularies alleged to be contravened.

principles of construction which are by law applicable to all written instruments, assisted only by such external and historical facts as it may find necessary to enable it to understand the subject-matter to which the instruments relate, and the meaning of the words employed. (P. 90.)

(4) If there be any doctrine on which the Articles are silent, or ambiguously expressed, so as to be capable of two meanings, we must suppose that it was intended to leave that doctrine to private judgment, unless the rubrics and formularies clearly and distinctly decide it. (P. 92.)

(5) "Devotional expressions (in the Services of the Church), involving assertions, must not, as of course, be taken to bear an absolute and unconditional sense. The meaning must be ascertained by a careful consideration of the nature of the subject and the true doctrine applicable to it. (P. 97.)

(6) The meaning to be ascribed to the passages extracted from the writings of accused parties must be that which the words bear according to the ordinary grammatical meaning of language; and the writer cannot be held responsible for more than he directly and advisedly asserts. (P. 283.)

(7) It is not necessary, in order to bring a clergyman within the Statute (13 Eliz. c. 12), that the Court should distinctly comprehend the exact bearing of the whole of his opinions on the subject as to which false doctrine is imputed to him. It is sufficient that he should have propounded doctrine directly contrary or repugnant to the doctrine laid down in the Articles. (P. 237.)

(8) The Court does not pronounce upon the tendency of writings from which extracts are brought before it, but only upon the extracts themselves. (P. 281.)

(9) The accuser is, for the purposes of the charge, confined to the passages which are included and set out in the articles of charge as the matter of the accusation; but it is competent to the accused party to explain from the rest of his work the sense or meaning of any passage or word that is challenged by the accuser. (P. 281.)

(10) Doctrines and opinions of great writers cannot be received as evidence of the doctrine of the Church of England; but their conduct, unblamed and unquestioned, proves, at

least, the liberty which has been allowed of maintaining such doctrine. (P. 102.)

(11) To obtain the benefit provided by the Statute (13 Eliz. c. 12—viz. the benefit of retractation), the accused person must hand in to the Court a formal revocation of those parts of his published writings which have been adjudged heretical. (P. 231.)

The detailed application of the principles thus enunciated, will be found in the Judgments which form the main body of this book; and it is by a study of these Judgments taken together, in their general scope and in their mode of treating the different classes of facts and of opinions with which they deal, that it must be determined whether that application has been made with impartiality, and with an adequate appreciation of the important subjects with which the Committee have had to deal. But the two following reflections cannot fail to be suggested by the foregoing review of the history of the appellate jurisdiction in the Church of England, from its earliest beginning to its latest phase in the Judicial Committee of the Privy Council.

First,—The constant practice, since the Appeal to Rome was abolished at the Reformation, and the Royal Supremacy was asserted, has been that laymen should form the larger part of the Appellate Tribunal, but that ecclesiastics also should usually have a place in the Court where doctrine and discipline were affected. It is, no doubt, possible to frame a theory according to which either part of this practice may appear objectionable. Yet in any theory which would separate the ecclesiastical and lay elements of the Court (without altogether forbidding the expression of opinion by one body or the other), account must be taken of the great danger which would follow from the possibility of two separate powers, each of which is entitled to be heard, arriving at inconsistent decisions, and thus gradually drifting into a position of mutual antagonism. To enter here upon this would be to import a discussion of opinions into a statement of facts. It is, however, a simple matter of fact, which ought to be noticed, that the manner in which the present Court has, in all the most important cases, been constituted, agrees well with the historical pre-

cedents which it has been the object of this Introduction to bring to light. The necessity of thus maintaining the union of principle between the lay and clerical elements of the nation has been constantly felt in the history of Ecclesiastical judicature in England. It was regarded as a principle, even before the Reformation, when the making and enforcing of Canons was only allowed on the condition that nothing should be done contrary to the laws and customs of the nation.[1] It occasioned the presence of lawyers on the Commissions for revising the Ecclesiastical Laws at the Reformation, and it has doubtless been one main reason for their having formed an integral part of the Court of Appeal since the Papal jurisdiction ceased, and the supremacy of the Crown in Ecclesiastical affairs was asserted.

Second,—The Court of Appeal has indicated very distinctly the principles on which it proceeds. Those principles are none other than the ordinary rules of law as applied, on the one hand, to the construction of written documents, and, on the other hand, to criminal processes entailing penalties on English subjects accused of violating the rules of their profession. The subject-matter, indeed, is such that the application to it of legal maxims is not easy, and there would be danger, in any but able and impartial hands, of losing the clue of simple justice which should be the guide in all the administration of the law. But more than one safeguard is always at hand. The Formularies of the Church are fixed, nor can they be altered, except by the deliberate action of the Church and State combined. Again, the principles of interpretation enunciated by the Court in its decisions are not, and cannot be invented, with a view to the particular emergency, but have been worked out in the precedents of past times, and in cases varying in all their circumstances and in their results. Further, the rules of the Court must be such as will apply to the various forms of clerical offences, to those which more nearly resemble the offences

[1] Possunt archiepiscopi et episcopi constitutiones facere . . . dum tamen jus commune non subvertant. Possunt etiam . . . statuta facere . . . dum tamen legibus generalibus non obsistant. Lyndwood, quoted in Stephens' Eccl. Stat. 150.

cognizable by ordinary criminal law as well as to those which touch upon deep questions of philosophy and religion. Moreover, its jurisdiction, high as it is, is not exclusive. There are several modes in which Ecclesiastical questions may be brought under the cognizance of the Courts of Common Law. With these Courts, therefore, the Court of Ecclesiastical Appeal must be kept in harmony. The advice and co-operation of persons conversant with theology is, no doubt, of great importance with a view to a correct apprehension of subjects brought before the Court. But it is impossible that different rules as to the interpretation of documents, and as to the principles applicable to cases of a criminal nature or involving the rights of property, should be adopted in the Ecclesiastical Courts from those ordinarily acknowledged in the Courts of Law, without producing sooner or later a conflict of jurisdiction of a very serious kind. Even, therefore, if the administration of Ecclesiastical jurisdiction were, as some have wished, to be committed to the hands of persons less well-trained in legal principles than is now the case, they would always have a corrective at hand in the Courts of Common Law. An action on Quare impedit, or an application for a Mandamus or Prohibition might be the means of restoring to the Ecclesiastical system the application of the rules of English justice, should any departure from them unhappily have occurred.[1]

W. H. F.

[1] See Blackstone's Commentaries, Introd. § 3. "The Courts of Common Law have the superintendency over these Courts (viz. the Ecclesiastical and Admiralty Courts) to keep them within their jurisdictions and to determine wherein they exceed them.

"The Common Law has reserved to itself the exposition of all such Acts of Parliament as concern either the extent of these Courts or the matters depending before them. And, therefore, if these Courts either refuse to allow these Acts of Parliament, or will expound them in any other sense than what the Common Law puts upon them, the King's Courts at Westminster will grant prohibitions to restrain and control them."

1865.

LIST

OF

THE JUDICIAL COMMITTEE OF HER MAJESTY'S MOST HONOURABLE PRIVY COUNCIL,

Established by the 3 & 4 Will. IV. c. 41, for hearing and reporting on Appeals to Her Majesty in Council.

THE EARL GRANVILLE, *Lord President.*

THE DUKE OF BUCCLEUGH, *formerly Lord President.*

THE MARQUIS OF SALISBURY, *late Lord President.*

THE EARL LONSDALE, *formerly Lord President.*

LORD WESTBURY, *Lord High Chancellor of Great Britain.*

LORD BROUGHAM, *formerly Lord High Chancellor.*

LORD CRANWORTH, *formerly Lord High Chancellor.*

LORD WENSLEYDALE, *formerly one of the Barons of the Court of Exchequer.*

LORD ST. LEONARDS, *formerly Lord High Chancellor.*

LORD CHELMSFORD, *formerly Lord High Chancellor.*

LORD KINGSDOWN, *formerly Chancellor of the Duchy of Cornwall.*

THE RIGHT HON. STEPHEN LUSHINGTON, D.C.L. *Judge of the Admiralty Court.*

THE RIGHT HON. SIR JAMES LEWIS KNIGHT BRUCE, KNT. *one of the Lords Justices of the Court of Appeal in Chancery.*

THE RIGHT HON. SIR JAMES WIGRAM, KNT. *late one of the Vice-Chancellors.*

THE RIGHT HON. SIR EDWARD RYAN, KNT. *formerly Chief Justice of the Supreme Court at Calcutta.*

THE RIGHT HON. SIR FREDERICK POLLOCK, KNT. *Lord Chief Baron of the Exchequer.*

THE RIGHT HON. SIR JOHN ROMILLY, KNT. *Master of the Rolls.*

THE RIGHT HON. SIR GEORGE JAMES TURNER, KNT. *one of the Lords Justices of the Court of Appeal in Chancery.*

THE RIGHT HON. SIR ALEXANDER EDMUND COCKBURN, BART. *Lord Chief Justice of the Court of Queen's Bench.*

THE RIGHT HON. SIR JOHN TAYLOR COLERIDGE, KNT. *late one of the Judges of the Court of Queen's Bench.*

THE RIGHT HON. SIR WILLIAM ERLE, KNT. *Lord Chief Justice of the Court of Common Pleas.*

THE RIGHT HON. SIR JAMES PLAISTED WYLDE, KNT. *Judge of Her Majesty's Court of Probate and Divorce.*

*** The two members appointed under the Sign Manual according to 3 & 4 William IV. c. 41 § 1, are Lord Kingsdown and Sir E. Ryan.

By the 3 & 4 Vict. c. 86, the Act for better enforcing Church Discipline, (section 16,) all Archbishops and Bishops, member of Her Majesty's Privy Council, are declared members of the Judicial Committee for all appeals under that Act; and no appeal shall be heard before the Judicial Committee unless one such Archbishop or Bishop (not having issued the Commission, or sent the case by Letters of Request), shall be present at the hearing.

The Prelates who at the present time are Privy Councillors are—

THE RIGHT HON. AND MOST REV. THE LORD ARCHBISHOP OF CANTERBURY.

THE RIGHT HON. AND MOST REV. THE LORD ARCHBISHOP OF YORK.

THE RIGHT HON. AND RIGHT REV. THE LORD BISHOP OF LONDON.

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CASES.

A COLLECTION

OF

THE JUDGMENTS,

&c. &c.

SPEER *v.* BURDER.

1840.

THE Members of the Judicial Committee present at this Appeal were :—

MR. BARON PARKE.	MR. JUSTICE ERSKINE.
MR. JUSTICE BOSANQUET.	DR. LUSHINGTON.

[A case of drunkenness, brought before the Court on the question of the admissibility of the Articles. The only point decided is, that an article charging a general habit is, in certain cases, admissible.]

The Appellant in this case, the Rev. Wilfred Speer, Perpetual Curate of Thames Ditton, in Surrey, had been cited before the Court of Arches, on the 12th of June, 1839, in a cause of office, promoted by the Respondent, as secretary to the Bishop of Winchester, to answer certain articles "concerning his soul's health and the reformation of his manners." These articles, fourteen in number, contained various charges against his moral character, and the third, in particular, alleged that he had addicted himself to excessive drinking ever since he had entered upon his cure, and had been in the habit of frequenting a public-house in the parish. The fourth alleged that his habitual behaviour in Church was indecent and irreverent, and that he had been repeatedly supplied with liquor from the same public-house during the performance of Divine Service. The six following articles charged him with acts of intoxication in Church on occasions therein specified.

Sir H. Jenner admitted these articles, and declared the charges fully proved; and, after commenting severely on the malice exhibited in the defence, sentenced him to three years suspension, with costs, and required him to produce a certificate of good conduct at the end of that period.

The appeal to the Privy Council was confined to the admission of the articles, and it was contended, on the Appellant's behalf, that the third, at least, ought to have been rejected as too general; to this objection it was replied that an ecclesiastical offence was clearly laid to the Appellant's charge in the articles, and that the third was specific enough for all purposes of defence, being founded on facts more exactly detailed in succeeding articles.

On the 2d of July, 1840, Judgment was delivered by Dr. Lushington.

"The sole question their Lordships have had to consider in this case is, as to the admissibility of the articles: whether they are sufficient, and ought to be admitted in their present form, or whether they ought to be rejected altogether; or reformed. There is no doubt that the charges are in conformity with the Ecclesiastical Law, and that habits of drunkenness and acts of intoxication in a beneficed Clerk are ecclesiastical offences. So far, therefore, as these articles charge or impute any specific act, their Lordships are of opinion they ought to be admitted. From the fifth to the tenth article, various offences of this kind are imputed, and one particularly specified in the sixth. It was proper also to plead the complaints made to the Bishop as in the concluding articles; these articles, therefore, must be admitted. The question then comes with respect to the third and fourth articles, in which a general habit of drunkenness accompanied with some particularity of statement is alleged. In a charge of this nature, it is very difficult to state with precision the habits of a party, though such habits form an ecclesiastical offence: the frequenting a public-house, drinking therein to excess, and becoming intoxicated, is in a Clerk an ecclesiastical offence; but it is contended, that the charge is too general in its effect, and ought to have been laid specifically

and in particular acts. That, in fact, the third article ought to be split into individual instances. It is very difficult to lay down any specific rule as to particular or general pleas: all, therefore, that their Lordships decide here is, that in this case the offence is sufficiently laid, and the articles ought to be admitted. If these articles shall ultimately turn out to be unsupported in evidence, the Court may expunge or reject them; but to call on the party now to split them into specific charges, would be to put the promovent to an expense not warranted in the circumstances of the case, and exact to proofs which the nature of the charge does not require. The case of *Oliver* v. *Hobart* [1] is not applicable: there, the charge was entirely general, running over a period of fifteen years, acquiesced in by the parishioners, and no individual or specific act as to time and place pleaded. Their Lordships are, therefore, of opinion, that these articles must be admitted, and the cause remitted to the Arches Court, with costs."

[1] Hagg. Cons. Rep. 43.

ESCOTT *v.* MASTIN.

1842.

THE Members of the Judicial Committee present at this Appeal were :—

LORD WYNFORD.	MR. JUSTICE ERSKINE.
LORD BROUGHAM.	DR. LUSHINGTON.

[A clergyman suspended for three months for refusing to bury a child baptized by a Wesleyan minister. It was held—

1. That a child baptized with water in the name of the Trinity by a Wesleyan minister not authorized to administer the rite of Baptism, was not "unbaptized" within the meaning of the Rubric in the Burial Service, as incorporated into the Uniformity Act, 13 and 14 Car. II. c. 4.

2. That a clergyman of the Church of England refusing to perform the office of interment, after due notice of the death of a parishioner so baptized, is liable to suspension under the 68th Canon of 1603.

3. That the validity of Lay Baptism, having been recognized by the Common Law of the Church, by the Rubrics of Edward VI. and Elizabeth, and by the Statute-Law, could not be affected by the directory words contained in the Rubrics of 1603 and 1661, and that these words, enjoining that a "lawful minister" shall be summoned to perform the rite of private Baptism are to be considered cumulatively, and not by way of substitution for the Rubric previously in force.

4. That the admission of a witness that he is a member of a religious sect who hold a certain principle as a body, which, if professed by him individually, might subject him to excommunication *ipso facto* by the 12th Canon of 1603, does not disqualify him from giving evidence.

A doubt was also intimated whether excommunication *ipso facto* (if not absolutely abolished by Statute 53 Geo. III. c. 127) disables a party from being a witness until absolved.]

In this case, the office of judge had originally been promoted in the Arches Court by the Respondent, Mr. F. G. Mastin, a parishioner of Gedney, in Lincolnshire, by virtue of letters of request from the Chancellor of the Diocese of Lincoln. The ground for the proceeding, as alleged in the articles, was the refusal of the Appellant, the Rev. T. S. Escott, Vicar of Gedney, to bury an infant, the daughter of Thomas and Sarah Cliff. The defence was, in effect, that the infant had never been baptized, and that a clergyman is not bound to read, or justified in reading, the burial service over an unbaptized person.

It was admitted both in the articles and in the subsequent argument that Mr. Escott did, in fact, state beforehand his determination not to bury the infant's corpse, and refused to bury it when brought to the churchyard. It was also admitted that the only ground of his refusal was the fact that it had only been baptized by a Wesleyan minister, which Mr. Escott maintained to be no baptism at all. The argument, therefore, on the merits of the case, was confined to the question, whether such baptism, that is, whether "lay baptism," is wholly invalid, so that a person who has received no other is disentitled to the rite of interment.

In support of the negative it was urged, that by the 68th Canon a minister of the Church of England is bound, on pain of three months' suspension, to bury "any corpse that is brought to the church or churchyard, convenient warning being given him thereof before, in such manner as is prescribed in the said Book of Common Prayer." The only exception recognised is that of one who should have been "denounced excommunicated *majori excommunicatione*, for some grievous and notorious crime, and no man able to testify of his repentance," and this exception, it was submitted, could not be applicable to an infant never admitted to the Church of England. On the other hand, it was urged, in support of the affirmative, that the Rubric prefixed to the order for the burial of the dead provides expressly "that the office ensuing is not to be used for any that die unbaptized;" that the Act of Uniformity (13 and 14 Car. II. cap. 4), in incorporating the Rubric, constructively limits the power of baptizing to a lawful minister, and that various [illegible]ions, as well as the 23rd Article, are directed against unlawful usurpations of the ministerial office. To this it was replied, on the part of the Respondent, that the term "unbaptized" in the Rubric must be interpreted strictly to mean, never received into the Church of Christ by any form of baptism, or at least, not baptized with water in the name of the Father, and of the Son, and of the Holy Ghost. Both sides appealed to the usage authorized in case of private baptism, the Appellant's counsel relying on the alteration made in the Liturgy by order of James I., and maintaining that it could only be

performed by an ordained minister, while the Respondent's counsel contended that it might still be performed by a layman, notwithstanding that alteration.[1]

On the 8th of May, 1841, the Judge of the Arches Court decided in favour of Mr. Mastin, the present Respondent, and sentenced Mr. Escott to a suspension of three months. The following are the material passages of the Judgment:—

"The question which the Court has to determine is, whether the term used in the rubric, of persons dying unbaptized is to be applied only in cases where there has been a total absence of the rite, or whether it is to be applied in cases where there has been a want of qualification in the person by whom it was administered. . . .

"It is admitted on all hands, that no baptism is valid unless the matter and form of words prescribed at the institution of the sacrament are observed and used; that is, that the child shall be immersed in or sprinkled with water, in the name of the Father, and of the Son, and of the Holy Ghost. . . .

"But it is contended on behalf of Mr. Escott that it is not enough that the outward and visible form or sign should be ministered, but that it must be administered by a person duly authorized and commissioned for that purpose; that is, since the year 1603, and more particularly since the year 1661, by an episcopally ordained minister, for that is the meaning of the words 'lawful minister' mentioned in the rubric which forms the present law on the subject. . . .

"The question, therefore, in this case, must eventually turn upon this; whether, since the alteration in that rubric, an episcopally ordained minister is absolutely necessary to the valid administration of this rite. . . .

"I need not state that the practice of the primitive Church is that to which the Court would pay the greatest attention. Now, in the very early, if not in the earliest, ages of the Church, baptism by lay hands, in the name of the Father, Son, and Holy Ghost, was practised and was allowed to be valid, and upon no account to be repeated.

"It appears that, so early at least as the end of the second, or beginning of the third century, the practice had obtained to a certain extent; for Tertullian, who lived at that time, wrote upon

[1] This alteration is fully explained in the Judgment.

the very subject;[1] and reference might be made to a vast number of passages in his works in support of the validity of lay baptism under certain circumstances. . . .

"On the other hand, St. Cyprian and Firmilian, who lived at a later period of the same century, maintained that Baptism by any other than those who were duly and properly commissioned was altogether null and void; and that persons baptized by heretical and schismatical priests, during the time of their heresy and schism, were not sufficiently baptized and ought to be baptized again. . . .

"But this (the latter) opinion of St. Cyprian and Firmilian was not generally adopted; it was expressly overruled by the Council of Arles. . . .

"The Eastern and Western Churches embraced different sides of the question. The Eastern Church did not adopt lay baptism till long after the time when the Western Church had embraced it. But towards the middle or end of the fourth or the beginning of the fifth century, the legality of Baptism administered by laymen was upheld by St. Austin, who has ever been looked upon as one of the most learned and pious of the Fathers of the Church. From this time the practice prevailed, and was allowed in both the Eastern and Western Churches. . . .

"The existence of the practice at this very early period, during the first four or five centuries—the best and purest ages of the Church—shows that the practice does not owe its origin to the corruptions of Rome. That many superstitions were grafted upon this practice is true, but that will not affect the present question. And the evidence of Tertullian, St. Austin, and St. Jerome is sufficient to establish the fact, that the practice existed at this time.

"After the time of St. Austin the ancient Canons bear ample testimony to the universal adoption of it as the rule and order of the Church. . . .

"It is sufficient to state that the validity of lay baptism was recognised, not only by the general Canon Law of Europe, and throughout the Eastern and Western Churches, but also by the law of England and of the English Church,[2] long before the Reformation. . . .

[1] He thus expresses himself in the 17th ch. "De Baptismo":—

"Dandi quidem habet jus summus sacerdos, qui est episcopus. Dehinc presbyteri et diaconi, non tamen sine episcopi authoritate, propter ecclesiæ honorem, quo salvo salva pax est. Alioquin etiam laicis jus est; quod enim ex æquo accipitur, ex æquo dari potest."

[2] Lyndwood, book i. p. 40. title 7, De Sacramentis iterandis vel non. bk. iii. p. 241. title 22. De Baptismo et ejus effectu.

"Such was the law of England up to the time of the Reformation. . . . At the time of the Reformation various alterations took place. The first of those alterations to which I shall refer is that which took place in the reign of Edward VI. . . . There were during his reign two Liturgies or Prayer-books published, one in the year 1549, and the other in the year 1552; and in those books the title of the form of private baptism was as follows: 'of them which be baptized in private house sin times of necessity.' Then followed this rubric.[1] . . . Nothing can be more plain and express upon the face of the direction in the rubric, than that the child is to be, in cases of necessity, baptized by one of the persons present, and that being so baptized it is beyond all doubt sufficiently baptized; for it is said, 'Let them not doubt but that the child so baptized is lawfully and sufficiently baptized, and ought not to be baptized again.' . . .

"The first Prayer-book of Edward VI. in 1549, was revised in the year 1552, but no material alteration in this Service appears to have been made. Upon the death of Edward VI., when Queen Mary succeeded to the throne, everything was restored to the state in which it stood previous to the Reformation; the Romish ritual was again brought into use, and the Acts of Parliament which had been passed in the former reign, with respect to religious matters, were repealed. But upon Queen Elizabeth's accession to the crown those Acts of Mary were in their turn rescinded; and then the Prayer-books of Edward VI. were again published, and again became the rules by which the offices of the Church were governed. . . . At the Convocation of 1575, which was a general Convocation of the province of Canterbury (I think it does not appear that the province of York had any concern or connexion with that Convocation), certain Canons, fifteen in number, were made and agreed upon; and amongst others there was one[2] which went directly to

[1] The rubric is as follows:—"The pastors and curates shall warn their parishioners that they defer not the baptism of infants longer than the Sunday, or other holy day, next after the child shall be born, unless upon a great and pressing necessity, to be allowed by the curate; and also they shall warn them that without great cause and necessity they baptize not children in their houses; and when great need shall compel them to do so, that they administer it in this fashion: First, Let them that be present call upon God for His grace, and say the Lord's Prayer, if the time will suffice; and then one of them shall name the child, and dip *him* in the water, or pour water upon him, saying these words, 'I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost.'"

[2] Collier in his Church History, vol. ii. page 552, has given a copy of this Canon.

prohibit the administration of private baptism by any but a lawful minister, or by a deacon called to be present for that purpose. . . .

"Gibson, in his first volume, page 369, says that, 'this Article was not published in the printed copy, but whether on the same account that the fifteenth Article was left out, that is, because it was disapproved by the Crown, I cannot certainly tell.' . . . No allusion whatever is made to it that I have been able to find in any contemporary writer. It does not appear to have been mentioned at the Hampton Conferences in 1603. It is not mentioned by Hooker, who wrote in 1585 or 1586. This document seems, so far as I have been able to ascertain, either to have been suppressed immediately it was passed, or if it was published at all, was never considered to have any binding authority. . . . And the non-appearance of this very important document is rendered still more extraordinary, by the circumstance that in the year 1584, a memorial or address was presented to Archbishop Whitgift[1] by the Puritans, nine years after the passing of this Canon, praying, amongst other things, 'That all baptizings by midwives and women may from henceforth be inhibited and declared void.'

"In the year 1559, Queen Elizabeth's Prayer-book is published, containing the very same rubric, and the same directions for the performance of private baptisms, as were contained in Edward the VIth's Prayer-books in 1548[2] and 1552. . . .

"Immediately upon the accession of James I. the Millenary petition was presented to him, in which the Puritans of that time complained again of the existence of the practice of baptism by women. . . .

"The consequence of this petition was that a Conference was held at Hampton Court.

"I think the result of this Conference at Hampton Court is not that which is alleged by Mr. Escott in his allegation, namely, that from that period to the present day, that is from 1603, the Liturgy of the Church of England has not allowed the rite of baptism, performed by unordained persons, to be valid, but has held the direct contrary. It appears to me that, though the persons engaged in that Conference did all that they could to discourage the administration of baptism by laymen and by women, yet that they could not prevail upon themselves absolutely and expressly to prohibit still less to declare such baptism altogether null and void. . . .

[1] Strype's Life of Archbishop Whitgift, vol. iii. p. 135.

[2] The Act enjoining the use of this Prayer-book was passed in January, 1549, N.S. See *infrà*, p. 132.

"But at the time of the Restoration in 1661, certain other alterations were made in the Book of Common Prayer. . . . From the year 1661 little or no alteration has been made in it. In substance it remains as at that time. The rubrics form a part of the Statute law, to which every person, both clerical and laic, is bound to conform, except so far as in any particular case special exemptions have been introduced by subsequent Statutes.

" Now the important part of the rubric to be considered at this time, is that which is prefixed to the service for the burial of the dead, because by that rubric for the first time it is declared that persons who die unbaptized are not to have this service read over them."

The learned Judge then reviewed the various authorities[1] on the subject of baptisms by persons who were not of Episcopalian ordination. He then said, "The different authorities from the time of Tertullian down to the time of the Reformation, and the acts of the Church afterwards, to which most of these writers refer, necessarily lead to the conclusion, that though lay baptism itself is irregular, the Church of England has always held it to be good and valid baptism, and by no means to be repeated." . . .

" All the other parts of the services which apply to it, seem to confirm this view of the law. In the Church Catechism it is asked how many sacraments there are, and the answer is 'Two.' Inquiry is made, 'How many parts are there in a sacrament?' The answer is again 'Two; the outward and visible sign, and the inward and spiritual grace.' Then comes the question, 'What is the outward and visible sign or form in baptism?' to which the answer is 'Water, wherein the person is baptized in the name of the Father and of the Son and of the Holy Ghost,' no mention being made of the minister as an essential part. . . . I am clearly, then, of opinion that the Church has not considered the minister as an essential part of the Sacrament of Baptism. . . . Therefore, in the view which I have taken, to my mind at least, it is clear, that the law calls upon me to pronounce that Mr. Escott has failed in establishing, to my satisfaction at least, that the Church does consider a child baptized by an unordained minister, by a minister of the Wesleyan body, who has no authority to baptize, either from the Church or the body

[1] Bishop Fleetwood's "Judgment of the Church of England on Lay and Dissenting Baptism," page 554. Bishop Burnet's "Hist. of his Own Times." "Life of Archbishop Sharp," published by his son. Bishop Van Mildert's "Life of Waterland." Wheatley upon the Common Prayer. Hooker, b. V. c. 62.

to which he belongs (though they could confer upon him no authority which the Church would acknowledge beyond that of a layman), is not validly baptized ; and, consequently, has failed to establish that the child in this case was unbaptized according to the doctrine of the Church of England, and according to the meaning of the rubric prefixed to the order for the burial of the dead. The, sentence, therefore, which the Court must pronounce must be that Mr. Mastin has sufficiently proved the articles by him exhibited, and that Mr. Escott has failed in proving the allegation by him given in."

A preliminary objection was taken, on the Appellant's part, before the Privy Council, to the competence of three witnesses called by the Respondent, on the ground that as members of the Wesleyan body, they were excommunicated, *ipso facto*, by the words of the 12th Canon.[1] This objection was resisted by the Respondent's counsel, and ultimately overruled by the Court on the same grounds as are assigned by Lord Brougham in the first three paragraphs of the Judgment, which was delivered on the 2d of July, 1842.

"An objection was, in opening this case, taken, and for the first time taken here, to three of the witnesses, Balley, Bond, and Overton, who it was contended were rendered incompetent by the 12th Canon of 1603, which ordains that 'Whosoever shall hereafter affirm that it is lawful for any sort of ministers and lay persons, or either of them, to join together and make rules, orders, or constitutions, in causes ecclesiastical, without the King's authority, and shall submit themselves to be ruled and governed by them, let them be excommunicated *ipso facto*, and not be restored until they repent, and publicly revoke those their wicked and Anabaptistical errors.' This objection ought clearly to have been made in the Court below. However, it is unavailing whensoever made. First, it would not dispose of the cause if it were allowed ; and next, it is unfounded, and cannot be allowed. That it would leave the case unaffected, if allowed, is plain both from the pleadings and the evidence. This is plain from the pleadings, because the first article of the responsive allegation admits the Appellant's refusal to read the Burial Service ; and

[1] This Canon is quoted at length by Lord Brougham below.

the third article, referring to the promovent's allegation, that the child had been baptized by a Wesleyan Minister, alleges such baptism to be null and void; while the tenth alleges its invalidity on a similar ground, and the seventh pleads the Rubric forbidding the office for the dead to be used for any that are unbaptized: so that the refusal to read the service being admitted, the ground of that refusal is pleaded—namely, that if the child had, as is alleged by the promovent, been baptized at all, it was by a person unauthorized, and that, therefore, there was no valid baptism; and thus the only material facts of the case are admitted by the pleadings, and the whole question is raised on the pleadings, without any evidence being required. But suppose the objection to prevail, it can only affect the three witnesses who have been named, Balley, Bond, and Overton, and has no application to Thomas and Sarah Cliff, who prove the whole case on the promovent's part. We are, however, of opinion, that the objection has no foundation. No one of the three witnesses is asked any questions, his answers to which could bring him within the description in the 12th Canon; no one of them admits that he is a person who affirms the competency of any minister or layman, without Royal authority, to make orders or constitutions in ecclesiastical causes, and that he submits himself to be governed by such orders. All they say is, that the Wesleyans, as a body, do so;[1] and that the witnesses are Wesleyans. Suppose (what is not admitted, however,) that the so affirming, and so submitting, would operate as excommunication without sentence, such effect could only follow from the individuals, as individuals, doing that which incurred this penalty.

"It becomes, from these considerations, unnecessary to inquire how far the dictum of the learned Judge,[2] in *Grant* v. *Grant*, (1 Lee's *Cases*, 593,) bears out the position contended for. But it is fit that we add our opinion, that the words in *Lyndwood*, p. 276, 'incurrit sententiam excommunicationis ipso

[1] In admitting this, Mr. Balley added: "although at the same time they profess to submit themselves to the Queen's authority implicitly."

[2] To the effect that persons excommunicated *ipso facto* are incompetent until absolved *ad testificandum*.

facto,' compared with those of the Canon, and Statute 5 & 6 Edward VI.[1] would make it very difficult to maintain this position; while the Toleration Acts, 1 Will. & Mary, and still more the 53d George III. c. 127, passed long after the date of Grant *v.* Grant, appears to leave no doubt that the incapacity, if it ever existed, is now removed.

"The objection taken below to the competency of the party promovent, on similar grounds, seems wholly untenable.[2] Indeed, the Appellant's counsel did not rely much on it here, feeling, probably, that the authority of the decision in "*Grant* v. *Grant*" was not to be got over. In that case, the point was expressly raised and determined; nor does the decision appear to have been called in question since. The learned Counsel, therefore, relied rather on the objection to the witnesses, as one which it was supposed that the *obiter dictum* in that case in some sort countenanced.

"The ground is thus cleared for examining the main question between the parties; and this resolves itself into the construction of the Rubric to the Burial Service. The 68th Canon is clear and distinct, attaching the penalty of suspension to a refusal of that office in any case except one—that of a person having been 'denounced excommunicated *majori excommunicatione*, for some grievous and notorious crime, and no man able to testify of his repentance.' But the Act of Uniformity, 13 & 14 Charles II. c. 4, having incorporated, as part of its provisions, the office for the Burial of the Dead, and the Rubric for that office forbidding the use of it for such as die unbaptized, it will be a sufficient defence to

[1] Cap. 4, sect. 2, making the offence of smiting in Church punishable with *ipso facto* excommunication. In this case it had been held that the excommunication, notwithstanding the words of the statute, would not take effect without some further proceeding.

[2] This objection was disallowed by Sir H. J. Fust, in the following words:—"I am clearly of opinion that this statute removes the process of excommunication completely; and that a person excommunicated under this Canon is relieved from all those civil disabilities to which he would before have been liable. And I am of opinion that the discontinuing is not the mere discontinuing in a particular case, but the discontinuing altogether, except in those cases which are specially mentioned. I am of opinion that there is nothing in this objection to prevent Mr. Mastin from promoting the office of the judge in this Court."

the charge, under the 68th Canon, if the child died unbaptized. The whole question, therefore, is reduced to this—does baptism, by a person not in holy orders, possess the character of that sacrament according to the laws of the Church?—in other words, can any one, other than a person Episcopally ordained, baptize so that the ceremony may be effectual as baptismal, though the performing it may be irregular, and even censurable? Is the solemnity performed by a layman, sprinkling with water, in the name of the Trinity, valid as baptism in view of the Church, although the Church may greatly disapprove of such lay interference without necessity, as she disapproves even of an ordained person performing the ceremony in a private house without necessity, and yet never scruples to recognise the rite so performed as valid and effectual? Nothing turns upon any suggestion of heresy or schism; the alleged disqualification is the want of holy orders in the person administering the solemnity, and it is as unqualified, and not as heretical and schismatical—heretic without, or schismatic within the pale of the Church—that any one's competency to administer it, is denied.

"The 68th Canon being that upon which this proceeding is grounded, it is necessary to consider what the law was at the date of the Canon, the year 1603. Without distinctly ascertaining this, we cannot satisfactorily determine what change the Rubric of 1661,[1] adopted into the 13th and 14th Charles II. c. 4, made, and in what state it left the law on this head, because it is very possible that the same enactment of a Statute, or the same direction in a Rubric, bearing one meaning, may receive one construction when it deals for the first time with a given subject-matter, and have another meaning and construction when it deals with a matter that has already been made the subject of enactment or direction; and this is most specially the case where the posterior enactment or direction deals with the matter without making any reference to the prior enactment or direction. Still more is it necessary

[1] That which prohibits the use of the Burial Service over unbaptized persons. This Rubric was introduced, with other modifications of the Liturgy, after the Savoy Conference, in 1661, and adopted by the Act of Uniformity in the following year.

to note the original state of the law, when it is the Common Law that comes in question, as well as the Statute.

"The Book of Common Prayer was adopted and prescribed by the Statute of 2d & 3d Edward VI. c. 1, and more fully by the 5th and 6th Edward VI. c. 1,[1] which the 1st Elizabeth, c. 2, revived, after it had been repealed by the 1st Mary, sess. 2, c. 2; and it was further prescribed and enforced by the same Act of Elizabeth, and by another made in the eighth year of her reign (8 Elizabeth, c. 1, s. 3). It is certain, then, that the Liturgy established during the interval between the first and the last of these Statutes—that is, between 1548 and 1565—was in force by Statutory authority down to the year 1603 (sometimes called 1603 and sometimes 1604, which is owing to the style, the date, if I recollect, being January), when the Canons in question were made, no alteration whatever having been effected during the interval. It is equally certain, that no authority existed to make any alteration inconsistent with Statutory provisions during that interval; and this consideration seems to dispose of the question which has been argued, both below and here, upon the 12th Canon of 1575.[2] That Canon is to be taken either as professing to make an alteration of the Rubric which the Statute had sanctioned, in which case it can have no force, or as declaratory of the sense of the Rubric; but neither would any such declaration be binding, because the Legislature having adopted the Rubric, and made it parcel of a Statute, no other authority than a declaratory Act can give it a new meaning; add to which, that the plain intendment of the Rubric appears to have been adhered to, after and notwithstanding the Canon of 1575, and not the sense which that Canon seems to give the Rubric, and which we must indeed admit that Canon purports to give it. The Canon of 1575 appears never to have excited any attention; and if it ever received the Royal assent (which is doubtful), it certainly was not cited on either side during the controversy on the subject of baptism at the Hampton Court Conferences.

"We are, therefore, to see what the Rubric prescribes at, and prior to, 1603—this being the Statutory provision then in

[1] This was the second Prayer Book of Edward VI.

[2] This canon is given *verbatim* by Wheatly, Common Prayer (p. 357).

force; and adopting the Common Law prevailing for 1400 years over Christian Europe.

"In the first place, no prohibition of the Burial Service for unbaptized persons, or indeed for any class of persons, is to be found in the Liturgies of Edward and of Elizabeth. The exception of unbaptized persons and suicides first occurs in the Rubric of 1661, and consequently first received the force of law from the Uniformity Act of 1662, after the Restoration —the 13th & 14th Charles II. c. 4. The Statutes of Edward the Sixth and Elizabeth recognised the right of every person to burial with the Church Service;[1] and the 68th Canon, enforcing this civil statutory right, only excepted persons excommunicate and impenitent. Unbaptized persons, therefore,—persons baptized in no way whatever,—would have had the right of burial according to the service of the Church, if they were not excluded by those portions of the service which appear to regard Christians alone.[2] Those portions would probably exclude persons not Christians; but if an unbaptized person could be regarded as a Christian, then would he not be excluded prior to the Rubric and Statute of 1661 and 1662.

"But, secondly, and what is much more material to our present inquiry, it is clear that the Rubric, and consequently the Statute, down to 1603, and indeed to 1662, the date of the Uniformity Act, authorized lay baptism, and placed it on the same footing with clerical baptism in point of efficacy.[3] The Rubric, after setting forth that baptism ought to be administered publicly, and on Sundays and holydays, in order to approach as near as might be to the practice of the primitive Church, which confined it to Easter and Whitsuntide,

[1] This statement is combated at great length by the Bishop of Exeter in his Charge for 1842; and he takes especial exception to the argument that the practice of burying excommunicated persons with the Church Service was sanctioned by the common law of Christendom.

[2] Wheatly, however, maintains that the exclusion of unbaptized persons from Christian burial is "exactly agreeable to the antient practice of the Church" in early ages.—(Common Prayer, ch. 12, sect. 1).

[3] This Wheatly admits, but he attributes it to an error "which our reformers had imbibed in the Romish Church, concerning the impossibility of salvation without the sacrament of baptism."—(Common Prayer, Appendix to ch. 7, sect. 12.)

nevertheless adds, that, if necessity require, children may at all times be baptized at home. A further warning is required to be given to the people against baptizing privately, 'without great cause and necessity,' and this Rubric is retained in the subsequent forms of prayer down to the present time. The Rubrics of Edward and Elizabeth then proceed to lay down the rules for administering the baptismal sacrament, when it is privately performed; and herein those Rubrics materially differ from the subsequent ones of 1603 and 1661.[1] They require 'them that be present to say the Lord's Prayer, if the time will suffer;' and the Rubrics add, 'then one of them (that is, any one of them that be present) shall name the child, and dip him in water, or pour water upon him, saying these words: "N., I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost. Amen."' We may observe, in passing, that there is contemplated a great hurry in the ceremony, because the expression is, 'if the time will suffer.' This of itself indicates that the circumstances are, or at least may be, such as to prevent the sending or the waiting for a Minister. The Rubric goes on to declare the sufficiency of baptism so performed: 'And let them not doubt but that the child so baptized is lawfully and sufficiently baptized, and ought not to be baptized again in the Church.' Nevertheless, the expediency is set forth of afterwards bringing the child to the Church, and there presenting him to the Minister, that it may be ascertained whether or not the ceremony had been lawfully performed. For this purpose, six questions are to be asked of them that bring the child:—Who baptized it?—Who was present?—Whether they called on God for his grace?[2]—With what matter the child was baptized?—With what words?—And whether they think he was lawfully and perfectly baptized?[2] If the answer to these questions prove that 'all things were done as they ought to be,' then the Minister is to say, 'I certify you that in this case ye (not you, the minister, but ye, the people) have done well, and according to due order,' and he declares the child to have been received into the number of the children of God, 'by the law of regenera-

[1] The words of the earlier Rubric are given above, p. 8, note 1.

[2] These two questions are omitted in the present service.

tion in baptism,' that is, by the sacrament previously administered in private. If, however, they which bring the child 'make an uncertain answer, and say they cannot tell what they thought, said, or did, in that great fear and trouble of mind, as oftimes it chanceth,' then the child is to be baptized publicly, but, as it were conditionally or provisionally, with this reserve, that the Minister shall say, 'If thou be not baptized already.' This portion of the Rubric is demonstrative, if the former part left any doubt, that the presence of a Minister at the private ceremony was not contemplated; for, if it were, what they thought, or said, or did, would be immaterial; and what the Minister said or did would have formed the only subject of inquiry; not to mention, that no fear or trouble of mind at the time of the ceremony could prevent those who bring the child from recollecting whether there had been a Minister present or not. Indeed, the questions would have been differently framed, had the presence of a Minister been as essential as the water and the words. It would have been asked, not merely 'by whom, and in whose presence,' but 'was he baptized by a Minister?' There can, therefore, be no doubt whatever that, by these earlier Rubrics, the baptism is deemed valid if performed with water, and in the name of the Trinity, though by lay persons. Assuming then, that there is no Minister present, the Rubric declares the baptism to be without any doubt lawfully and sufficiently administered, though in private.

"The same doctrine was held, and the practice formed upon it, in the Roman Catholic Church, from a very early period. It prevailed from the beginning of the third century; and though it formed the subject of controversy between the Eastern and Western Churches, during the succeeding period, it had become universally admitted by both, in the time of St. Austin, who flourished in the latter part of the fourth century. In England, as elswhere, it was held valid. The Constitutions of Archbishop Peecham, in Lyndwood's *Collection*, bearing date A.D. 1281, though severely denouncing a layman who shall intrude himself into the office without necessity, yet declare the baptism valid which is celebrated by laymen, and state that it is not to be repeated. Whoever

did so intrude, was denounced as guilty of 'mortal sin;' nevertheless, his act was pronounced to be valid and sufficient, and that it was not necessary the ceremony should be repeated. Now, in all these positions, the necessity can make no kind of difference, unless in excusing the intrusion. If the rite can only be administered by clerical hands,—if it be wholly void when administered by a layman,—no necessity can give it validity. The consecration of the elements, for the purpose of giving the Eucharist to a dying person, may be as much a matter of urgent necessity as the baptism of an infant in extremities; but, neither in the Roman Catholic, nor in the Reformed Church, was it ever supposed that any extremity could dispense with the interposition of a priest, and enable laymen to administer the sacrament of the Lord's Supper.

"The position, therefore, being undeniable, that, previous to the year 1603, and at the time the 68th Canon was made, lay baptism, though discountenanced and even forbidden, unless in case of necessity, was yet valid if performed; and this being the Common Law—not the law made by Statute and Rubric, but by Statute and Rubric plainly recognised and adopted—we are to see if any change was made in that law as it thus stood.

"In the Burial Service, the Rubric of 1603 made no change, but that of 1661 forbad the Burial Service in cases of suicide, excommunication, and persons unbaptized. A right formerly existing was thus taken away, at least in some cases. This makes it fit that we construe the word 'unbaptized' strictly, or, which is the same thing, that we give a large construction to 'baptized.' And, after the change in the Burial Service, it becomes the more necessary to see that there is a clear and undoubted change in the Rubric relating to baptism, before we admit the baptism to be invalid, which was held valid even when the Rubric of the Burial Service had not as yet taken away the rite from all who were unbaptized.

"The Rubric of 1603, instead of directing 'those present,' in the case of private baptism, as the former Rubrics had done, directs 'the lawful Minister' to say the prayer, if time permit, and to dip or sprinkle the child, and repeat the words. The

Rubric of 1661 explains what shall be intended by 'lawful Minister,' substituting for that expression the words, 'Minister of the parish, or, in his absence, other lawful Minister, that can be procured.' It there prescribes a prayer to be used by the Minister, which prayer is not to be found either in the Liturgies of Edward VI. and Elizabeth, or in that of 1603. We may pass over the Rubric of 1603, both because its substance is more completely contained in that of 1661, and because, until 1662, there was no Statutory authority for any change of the law which had been established at the date of 1603 (or 1604), when the Canon in question was made, even if it had been quite clear that the Rubric of that date had changed the former Rubrics. But as, in 1662, the present Uniformity Act of 13 & 14 Charles II. c. 4, was passed, and gave force and effect to the Rubric of that date, it becomes necessary to see whether or not that Rubric changed the former ones, those of Edward and Elizabeth.

"Now it does not appear that any such change was effected as the case of the present Appellant must assume, in order to prevail. The words are plainly directory, and do not amount to an imperative alteration of the rule then subsisting. If lay baptism was valid before the new Rubric of 1661, there is nothing in that Rubric to invalidate it. Generally speaking, where anything is established by Statutory provisions, the enactment of a new provision must clearly indicate an intention to abrogate the old; else both will be understood to stand together, if they may. But, more especially, where the Common Law is to be changed, and, most especially, the Common Law which a Statutory provision had recognised and enforced, the intention of any new enactment to abrogate it must be plain, to exclude a construction by which both may stand together. This principle, which is plainly founded in reason and common sense, has been largely sanctioned by authority. The distinction which Lord Coke takes in one place, between affirmative and negative words, giving more effect to the latter (Coke, *Littleton*, 115 a), has sometimes been denied, at least doubted (*W. Jones*, 270, Lovelace's case, before the Windsor Forest Court, in 1632, in which there is a *dictum* of Lord Chief Justice Richardson), Mr. Hargrave thinks upon

a misapprehension. (Note 154.) But the rule which is laid down in 2d Inst., 200, has been adopted by all the authorities, that, 'a Statute made in the affirmative, without any negative expressed or implied, doth not take away the Common Law.' So Comyn's *Digest*, Parliament R. 23; and he cites the case *De Jure Ecclesiastico*, in 5th Rep. 5, b, which lays down the rule in terms. That case decides that the penalty attached by the Uniformity Act of Elizabeth, for not reading the Common Prayer, on the second offence, does not take away the same Common Law penalty on the first offence. Now here, the former law being this—'Let lay baptism be valid, but let Ministers only perform the rite, unless in case of great necessity;' and the new law being—'Let lawful Ministers baptize,'—it must be taken as an addition to, and not a substitution for, the former, unless the intention plainly appear to make it substitutionary, and not cumulative. The proof is on those who would make it substitutionary and abrogatory. But the circumstances and the context seem, on the contrary, to show that the intention was to make the new Rubric cumulative, and to leave the validity of lay baptism unaltered. The private baptism is expressly confined to cases of 'great cause and necessity,' and the want of time is expressly referred to, as being great enough possibly to prevent saying the Lord's Prayer. How, then, can it be expected that time should be given to send for the Minister of the parish, and, if he be absent, to procure some other Minister? Doubtless, it is required that a Minister shall perform the ceremony if he can be procured; but the possibility of there being none, must be understood to have been contemplated. Again, it is directed, that if any lawful Minister, other than the Minister of the parish, performed the ceremony, then the Minister of the parish, when the child is brought to him, shall examine how the ceremony had been performed. The questions prescribed by the former Rubrics are materially changed. Two are left out; that respecting calling for grace, and that respecting their opinion of the ceremony having been completed. But an important preamble is inserted, before the question as to the matter and the words:—'Because some things essential to this sacrament may happen to be omitted, through fear or

haste, in such times of extremity, therefore I demand further, "With what matter and with what words was this child baptized?"' Now it is remarkable, that the essentials here spoken of are the water, and the reference to the Trinity; nothing whatever is said of the Minister being essential. The questions as to who baptized and who were present, are given without any preamble at all, indicating that the water and the invocation of the Trinity are essentials, while the presence of a Minister is only expedient—a matter to be inquired into, for the purpose of correction or censure if it was omitted without necessity, but not essential, as those things wherein consisted the very rite itself, the water and the words. The water and the words are afterwards again stated to be 'essential parts of baptism,' in the Rubric which provides for the case of a doubtful baptism, sometimes called conditional. If it were assumed that in every case a lawful Minister was necessary, and that there could be no baptism without his presence, the only necessary question to be answered by those who brought the child, would be, whether such Minister officiated or not; for it might be assumed that he used the matter and the words preseribed, inasmuch as he would be punishable if he did not.

"The whole direction as to conditional baptism is very material to be regarded, and no part more so than the last Rubric relating to it. If the answers are uncertain, the baptism is to be made, but provisionally or conditionally. What kind of uncertainty is contemplated? If a Minister had been essential, surely any uncertainty as to who performed the ceremony would have been specified as a ground of conditional baptism. But nothing of the kind is to be found in the Rubrics of 1603 and 1661, any more than in those of Edward and Elizabeth. Nay, the uncertainty is more specifically confined to the water and the words in the later than in the earlier Rubrics:—'If it cannot appear that the child was baptized with water, in the name of the Father, and of the Son, and of the Holy Ghost,' which (adds the Rubric) 'are essential parts of baptism,' then, and then only, is the child to be baptized, and conditionally.

"The question directed to be put, as to who baptized the

child, clearly proves nothing as to the necessity of a Minister; for another question immediately follows, which relates to a matter that must on all hands be admitted to be anything rather than essential, namely, 'Who were present at the ceremony?' And if it be said that this might be asked not as a substantive question, the answer to which is essentially necessary, but as a question the answer to which may tend to facilitate other inquiries, and to explain other answers: in the same way it may be said, that the answer to the first question, 'Who baptized the child?' may be used simply for the purpose of explanation as to the really essential matters —the water and the words.

"The changes made in the Rubric, touching uncertain and conditional baptism, are mainly relied upon to show that the Rubrics of 1603 and 1661, invalidated lay baptism, and certainly those changes afford the only countenance lent to the negative argument. But they are wholly insufficient to work an abrogation of the former law. The omission of the question, 'Whether they (the people) called for grace and succour in that necessity?' is said to show that the people were no longer to officiate, but only the Minister, who had no occasion for that succour. Yet, beside that this seems a very gratuitous position, the persons present were inquired of, and they surely were not material. The question as to the opinion of the party bringing the child is also omitted. But it is not omitted in the Rubric of 1603, which, nevertheless, is supposed to negative the validity of lay baptism as much as the Rubric of 1661. Perhaps the most material change in this part of the service is in the certificate, which is no longer that 'Ye have done well,' but 'that all is well done.' But this, though in the direction of the Appellant's argument, and lending colour to it, is manifestly too slender a foundation on which to ground any inference. We must always bear in mind, that it was the intention of those who framed the new Rubric to discountenance all baptism, except by a Minister, and to assume, as far as possible, that it should by a Minister be performed; and the omission of whatever was not quite necessary, and what needlessly contemplated a lay administration of the rite, was a natural consequence of this design. But if

it had been the intention of those who framed the Rubric to declare lay baptism ineffectual, some express declaration to that effect would have been introduced.

"It is unnecessary to give instances of the difference between positive directions, nay, express prohibitions, and such prohibitions as make the thing forbidden to all intents and purposes void. If it were necessary to point out instances of such distinctions, the kindred subject of the marriage rite affords one too remarkable to be passed over. There is hardly any country where some solemnity is not required by the directions of the law; there are many in which a departure from the order prescribed by the law is strictly forbidden, and under penalties; but in most Protestant countries the irregular marriage is valid; and in Catholic countries also, up to a comparatively recent date—that of the Council of Trent—though it might be censurable, was valid, without the interposition of a priest, and without any ecclesiastical solemnity whatever. England, before the Marriage Act (the 26th of George III. cap. 33) commonly called Lord Hardwicke's Act, affords one instance of this; Scotland to this day affords another; nay, the existing Marriage Act of 4th George IV. cap. 76, presents us with an instance still more remarkable and bearing more closely upon our present argument; for some of the marriages, to prevent which was the main object of this as of the former Act, are allowed by this latter Act to be valid, and are only valid, because they fall not by express declaration within the 22d section, which certainly confines the invalidity to the cases specified in that section. But if it be said that baptism is a sacrament, while marriage is not, let it be remembered that in the Romish Church marriage too was a sacrament, and retained its character as such though performed without the intervention of a priest or any solemnity of the Church. (*Dalrymple* v. *Dalrymple*, 2 Hag. Cons. Rep. 64, and the authorities there cited.)

"The opinions and practice of the Church, from the date of the Canon, 1603, down to that of the Uniformity Act of Charles II. and afterwards till near the end of Queen Anne's reign, appear to have been clear upon this head. The validity of lay baptism, notwithstanding the change in the Rubric,

was not questioned until about 1712, when the controversy arose, and some eminent divines took part against its validity. It is unnecessary to examine the authorities in detail. We may observe, that there seems no comparison between the number and the weight of those who espoused the opposite sides of the question. There are very few indeed who can be said to give a clear and explicit opinion against the validity, while those who maintain it lay down the doctrine with the most perfect distinctness. The substance of the conclusions to which they come, and the testimony which they bear to the practice, may be well given in the words of a writer no less renowned for his learning and judgment than his eloquence. 'Sith the Church of God,' says Hooker (Ecclesiastical Polity, Book V. sec. 62), 'hath hitherto always constantly maintained that to re-baptize them which are known to have received true baptism is unlawful; that if baptism seriously be administered in the same element, and with the same form of words which Christ's institution teacheth, there is no other defect in the world that can make it frustrate or deprive it of the nature of a true sacrament; and lastly, that baptism is only then to be re-administered when the first delivery thereof is void in regard of the foresalleged imperfections, and no other (that is, the words and the matter)—shall we now, in the case of baptism, which, having both for matter and form, the substance of Christ's institution, is by a fourth set of men (he had mentioned with more or less censure, the errors of some in the primitive Church, of the Donatists, and of the Anabaptists), voided for the only defect of ecclesiastical authority in the minister, think it enough that they blow away the force thereof with the bare strength of their very breath, by saying "We take such baptism to be no more the sacrament of baptism than any other ordinary bathing, to be a sacrament?"' And he then goes on to show how 'many things may be upheld being done, although in part done, otherwise than positive rigour and strictness did require.'

"The clear and unqualified opinion upon the point, and *post litem motam* of the two Metropolitans and fourteen other prelates, has also been properly referred to; and is no doubt

of great weight. But the question is not to be decided by a reference to the opinions, however respectable, of individuals, eminent for their learning, or distinguished by their station in the Church; and these authorities are chiefly valuable as bearing testimony to the fact, that the construction of the Rubrics of 1603 and 1661 was acted upon, which construction assumed no change to have taken place in the former law, the common law of all Christendom, before the Reformation of the Anglican Church, and both before and after that happy event, the law of the same Church up to the date of the canons of 1603—a law which was recognised by the Statutes of Edward and Elizabeth, and which, as nothing but express enactment could abrogate, so we might the rather expect to find contemporaneous usage confirm, when no abrogation had been effected.

"Nor is it necessary that we should strengthen the conclusions to which a strict construction of the law has led, by pointing out the inconsistent or even absurd consequences which would follow from an opposite doctrine. If only a lawful minister can baptize, then, as it is also contended that this description only applies to those who are regularly and episcopally ordained, it will follow, that none can be capable of clerical functions who have not themselves been baptized by Ministers so ordained; and hence some of the greatest lights of the Church have held her highest offices unbaptized, have administered that sacrament invalidly, and have had no right to the offices of the Church at their interment. A doctrine which would lead, and inevitably lead, to the inference that Bishop Butler and Archbishop Secker were never baptized[1]—that the latter in baptizing George III. acted without authority, and that both were disentitled to the Burial Service, as unbaptized persons, is at least well calculated to make us pause before we admit it to be the law of the land, and of the Church.

"But it is not less fitted to excite doubts of its soundness before examination, when we reflect that another inevitable consequence would also flow from its admission,—the exclusion from the Church's pale, of all Dissenters, and of all foreigners

[1] Both were sons of nonconformists.

who have been baptized otherwise than by Ministers of Episcopal Ordination. No *lex loci* is set up, or can be pretended to work any exception in their favour. The Rubric, if it applies to any, applies to them; and unless they shall have been re-baptized, they can neither be ordained, should they embrace our tenets, nor buried with the rites of our Church, should they depart this life within our territory. All these topics are, however, superfluous, when the question has been sifted upon its true merits, and brought to the test of a more rigorous examination, as was done both in the present case by the Court below, and in the former instance before the late learned and able Judge of the Arches Court, Sir John Nicholl.

"The case of *Kemp.* v. *Wickes* in 1809 (3 Phill. 264), was in every respect, as regards the facts, similar to the present. It underwent a full discussion; the only difference was in the course pursued by the Defendant in his pleading, which was more commendable than that adopted in this case;[1] and the learned Judge[2] pronounced an elaborate judgment upon the point now before the Court, as to the merits, neither of the preliminary objections having been taken. That judgment does not appear to have given any dissatisfaction in the profession; on the contrary, it is believed to have carried along with it the opinion of lawyers in both the Courts Christian and the Courts of Common Law. We can hardly avoid attaching great weight to a decision pronounced by such an authority, so long acquiesced in, so little objected to, and generally speaking, so much respected, although no decision has hitherto been given on the same question in any Court of the last resort.

"The Court below justly held, that if the penalty of the Canon has been incurred, no discretion is left in awarding its infliction. It appears to us, also, that the costs were properly directed to be paid. The Appellant had taken a course which was wholly unnecessary for raising the question of lay baptism, upon which alone his defence was rested, as far as the

[1] The admission of the articles was there opposed on the ground that they disclosed no offence in point of law; whereas here a defensive allegation was filed.

[2] Sir John Nicholl.

merits were concerned, or for raising the preliminary objection to the promovent's rights. Both the one and the other of these points were distinctly raised upon the articles, and might have been disposed of by meeting that allegation alone, and disposed of at a comparatively trifling expense. In *Kemp* v. *Wickes*, that better course was pursued. The articles, there as here, had detailed the circumstances offered to be proved, and the defendant at once opposed the admission of them, contending that, be the facts all true as alleged, he had acted lawfully, and was guilty of no offence. This might have been just as easily done in the present case, but it has not been done; on the contrary, a proceeding has been resorted to greatly increasing both the delay and expense, and wholly unnecessary for raising the only questions intended to be discussed between the parties.

"The sentence appealed from must, therefore, be affirmed, in all its parts, and the Appellant must further pay the costs of this appeal."[1]

[1] The Bishop of Exeter's Charge for the year 1842, already quoted, contains an elaborate critique on this judgment. He contends that baptism by heretics or schismatics is not "sufficient" in any theological sense, and that "the general words of the 68th Canon applied to those only who died members of the Church." The following extract exhibits his view as to the limited effect of the decision :—

"As the Court stated, 'nothing turned upon any suggestion of heresy or schism; the alleged disqualification was the want of holy orders in the person ministering.'

"Now, this consideration must very much mitigate any alarm which the judgment, before it was understood, may have excited within the Church, as well as abate somewhat of the tone of triumph with which it is said to have been hailed out of the Church. In the case decided, the deceased infant had been baptized by a Wesleyan teacher; of whom it was not said in the allegation of the defendant that he was either heretic or schismatic. Of course, therefore, the Court regarded him as neither one nor the other. Had schism been pleaded, as affecting the efficacy of the baptism, the Court must have noticed it. Whether such a plea would have altered the judgment, it would be presumptuous in me to conjecture. It is enough to say that the judgment left this very important point just where it was. It only decided, I repeat, that a minister is bound to bury *an infant* who had been baptized by a *layman*. It did not so much as decide whether he is bound to bury an *adult*, who, having been so baptized, had never sought to have the deficiencies of his baptism duly supplied. This point would remain undecided, even though the layman administering baptism was himself a member of our Church."

The issue as to the validity of baptism by a dissenting minister, as such, seems to have been distinctly raised in the case of *Kemp* v. *Wickes* in 1809

(3 Phill. 264), cited by Lord Brougham, in which Sir J. Nicholl states that "It appears impossible to entertain a reasonable doubt that the Church did at all times . . . hold baptism by water in the name of the Father, the Son, and the Holy Ghost to be valid baptism, though not administered by a priest who had been episcopally ordained, or rather, to state it more generally, though administered by a layman or any other person."

In the case of *Titchmarsh* v. *Chapman* (3 Curteis, 840), the judgment in *Escott v. Mastin* is held to rule the question of baptism by a schismatic. Sir H. J. Fust states: "The question is directly raised whether or no baptism of this description, pleaded to be heretical and schismatical, is invalid baptism, so as to take the case out of that decision in Escott *v.* Mastin;" and "it being not now questioned that baptism by heretics or laymen is a valid baptism, and need not be reiterated, . . . the recipient cannot be said to die unbaptized. There cannot, then, be any doubt in the mind of the Court, as to what must be the fate of the case, when, as I have shown, the baptism itself is admitted to be valid."

HEAD *v.* SANDERS.

1842.

THE Members of the Judicial Committee present at this Appeal were :—

THE BISHOP OF LONDON (Blomfield). VICE-CHANCELLOR KNIGHT BRUCE.
LORD CAMPBELL. DR. LUSHINGTON.

[This was a proceeding against a Clergyman for depraving the Book of Common Prayer, punishable by the Act 1 Eliz. c. 2, which came before the Court on Appeal from a "grievance." Held—

(1.) It is not necessary that Letters of Request, under the Church Discipline Act, should specify at whose request they are granted.

(2.) The service of a notice by a Bishop of his intention to issue a Commission under the third section of the Church Discipline Act, will not bar his right to send the case to the Court of Arches by Letters of Request, "in the first instance," if no Commission has actually been issued.]

The Rev. Henry Erskine Head, Rector of Feniton, in Devonshire, published a letter in the *Western Times*, entitled, "A View of the duplicity of the present system of Episcopal Administration, in a Letter addressed to the Parishioners of Feniton, occasioned by the Bishop of Exeter's Circular on Confirmation," &c. This letter contained the following passages :—

"The only plea which can shield our Prelates from the charge of intentional duplicity, is, that they really are not aware of the unscripturalness and mischievousness of those dogmas, with which they incumber themselves and us. Ignorance of Scripture is that, which is to be attributed to their Lordships on a principle of mere charity. Hence their unreadiness to do that which they promise to be ready to do; hence their unwillingness to reform, or, (at least so far as their own ministrations are concerned,) to rectify or avoid the serious error which the confirmation service contains. Hence their reckless, ruthless, and inconsistent recommendations, to

the public and to the clergy, of doctrine which is erroneous, strange, and contrary to God's Word. The Episcopal Circular, which I have now received, is a clear specimen of a system of duplicity by which their Lordships, the Bishops, have long been deceived, and are now perhaps more extensively than ever deceiving the public."

"As reformation in this respect is not hopeless, and as I also am pledged, by my ordination vows, as a minister of the Church of England, to banish and drive away all erroneous doctrine, I do hereby decline and refuse to give any countenance whatever to the office of confirmation, as it is now used by their Lordships, the Bishops; and, instead of recommending, in compliance with the Episcopal Circular, the perusal and re-perusal of that service to the young persons of this parish, I warn them all, young, old, and middle aged, to beware, in the name of God, of the erroneous and strange doctrine which it contains."

"It will be said, that for this, I deserve to be turned out of the Church; are all clergymen to be turned out of the ministry who dissent from certain points in the Prayer-book?

"In this case, everybody will be turned out of the ministry, and then nobody will remain in the ministry; show me the works of any Churchman within the last four centuries, and I will undertake to convict him of inconsistency with the Prayer-book. It is a fact, that there is no Bishop or Clergyman in England, in Ireland, or in the Colonies, who does not sin against the Prayer-book in one point or another. It is also a fact that the Prayer-book sins against itself; some parts of it are at variance with other parts; the fourth, sixth, eighth, and thirty-sixth canons are repugnant to the first and third ordination vows. Some of the dogmas in the Catechism, Confirmation, and Baptismal Services, are utterly inconsistent with the doctrines contained in the eleventh, twelfth, thirteenth, and seventeenth Articles."

On the 11th of October, 1841, the Bishop of Exeter caused to be served on Mr. Head the notice required by 3 and 4 Vict. c. 86 (Church Discipline Act) of his intention to issue a Commission of Inquiry. On the 9th of November, and

before the Commission was issued, the Bishop sent the case to the Court of Arches by Letters of Request, in which Letters the Respondent (Mr. Sanders) was named as the promovent. On the 14th of November, a decree issued from the Arches Court, calling upon Mr. Head (in the terms of the Letters) to answer certain articles to be exhibited against him touching his soul's health and the reformation of his manners, especially in the matter of the letter above mentioned, wherein, as was alleged, he had depraved the Prayer-book. Mr. Head appeared under protest, objecting to the jurisdiction on the same grounds as were afterwards assigned before the Privy Council. Sir H. J. Fust, however, overruled the protest, on the 29th of January, 1842, and ordered the Appellant to appear absolutely. From this decision the present appeal was brought, and the only point involved in it was the validity of the Letters of Request.

It was argued, on behalf of the Appellant, that, according to the true construction of 3 and 4 Vict. c. 86, s. 13, the Bishop ought to elect, "in the first instance," between a Commission of Inquiry and Letters of Request, failing which, he cannot resort to the latter method of proceeding until after the Commissioners have reported, and before articles have been filed. Whereas, in the present case, he had already notified his intention of issuing a Commission, and had not withdrawn that notice when the Letters were presented, no Commission having, in fact, been issued. It was also contended that the Letters, though issued on the promotion of the Respondent, were defective in point of form, since the original notice had been given by the Bishop on his own "mere motion."

It was replied, on behalf of the Respondent, that the preliminary notice was in the nature of an admonition, and not of a citation, so that the Bishop would not be barred of his right to proceed by Letters of Request, "in the first instance," until the Commission should have been issued. It was further replied that neither law nor practice required strict accuracy in the specification of the party on whose application the suit was commenced. These arguments had been adopted by the Court of Arches in the decree confirmed by the following Judgment, which was delivered by Lord Campbell, on the 9th of December, 1842.

"This is an appeal from an order or decree made by the Dean of the Arches, in a cause of office, promoted under the Act of the 3rd and 4th of Her present Majesty, in virtue of Letters of Request under the hand and seal of the Bishop of Exeter, by Ralph Sanders, against the Rev. Henry Erskine Head, Clerk, Rector of the Rectory and Parish Church of Feniton, in the county of Devon, to answer certain articles to be exhibited against him, for having, within the diocese of Exeter, written and published, in a certain newspaper called the *Western Times*, a letter, entitled, 'A view of the duplicity of the present system of Episcopal Ministration, in a letter addressed to the parishioners of Feniton, Devon, occasioned by the Bishop of Exeter's Circular on Confirmation, by Henry Erskine Head, A.M., Rector of Feniton, Devon;' affirming and maintaining that the 'Catechism,' the 'Order of Baptism,' and the 'Order of Confirmation,' in the Book of Common Prayer, contain erroneous and strange doctrine, and other positions in derogation and depraving of the said Book of Common Prayer, and against the peace and unity of the Church.

"The Defendant being cited in the Court of Arches, appeared under protest, and insisted that the Letters of Request were not in pursuance of the provisions of the Church Discipline Act, and, therefore, that the Dean of the Arches had no jurisdiction to entertain the suit. The Judge below overruled the protest, and assigned the Defendant to appear absolutely.

"The first objection is, that the Letters of Request are *ex facie* defective and void, on the ground that they do not show on whose application the cause was commenced, or at whose request they were granted. Their Lordships, however, are of opinion that the Letters of Request are sufficient. The statute does not require that they should be in any given form, and they clearly disclose that the cause is 'at the voluntary promotion of Ralph Sanders, of the City of Exeter, gentleman.' The Bishop having authority by the statute to issue Letters of Request in this proceeding, 'if he shall think fit,' there can be no necessity for stating, according to the old form, at whose request they are granted. For the reasons

hereafter to be mentioned, their Lordships think that the Letters of Request need not make any reference to the notice before served by the Bishop.

"The second objection, of a graver nature, is, that at the time when the Letters of Request issued, the Bishop had no authority to issue them, as he had made his election to proceed, in the first instance, by a Commission of Inquiry in his own diocese. The third section of the Act gives power to the Bishop, upon a clergyman within his diocese being charged with any ecclesiastical offence, or concerning whom there may exist scandal or evil report, to issue a commission of inquiry as to the grounds of such charge or report, 'provided always that notice of the intention to issue such commission under the hand of the Bishop, containing an intimation of the nature of the offence, together with the names, addition and residence of the party on whose application or motion each commission shall be about to issue, shall be sent by the Bishop to the party accused fourteen days at least before such commission shall issue.

"On the 11th of October, 1841, the Defendant was in due manner served with a notice under the hand of the Bishop of Exeter, dated the same day, which, after reciting the letter in the *Western Times*, referred to in the Letters of Request, and that there was an evil report that Mr. Head was the author and publisher of the said letter, proceeded in these words,—'And whereas we, Henry, by Divine permission Bishop of Exeter, rightly and duly proceeding under the authority and in conformity with the provisions of a certain Act of Parliament, to wit, the 3rd and 4th Vict. c. 86, intituled, 'An Act for better enforcing Church Discipline,' of our own mere motion think fit, and intend, to issue a commission under our hand and seal, to five persons, of whom one shall be our Vicar-general, or an Archdeacon, or Rural Dean within our diocese, for the purpose of making inquiry as to the grounds of such report, in order to the institution, if need be, of such further proceedings in pursuance of the last-mentioned Act of Parliament, as the case may require. We do, therefore, by these presents, under our hand, give notice of such our intention to you, the said Reverend Henry Erskine Head,

and we do hereby intimate to you, that such our commission, as aforesaid, for the purpose aforesaid, will issue accordingly at or after the expiration of fourteen days from the day of your being served with these presents. Given under our hand this Eleventh day of October, in the year of our Lord One Thousand Eight Hundred and Forty-One.'

"On the 9th of November following, without anything being done to countermand or supersede this notice, the Letters of Request issued, by which the Defendant, without any commission of inquiry, was to be prosecuted in the Court of Arches.

"It is contended that this was contrary to the 13th section of the Statute, which enacts that it shall be lawful for the Bishop in any such case, 'if he shall think fit, either in the first instance, or after the commissioners shall have reported that there is sufficient *primâ facie* ground for instituting proceedings, and before the filing of the articles, but not afterwards, to send the case, by Letters of Request, to the Court of Appeal of the Province, to be there heard and determined, according to the law and practice of such Court.'

"It is contended, that, by reason of the notice, the Letters of Request were not sent in the first instance, within the meaning of the statute; and if that were so, they would certainly be void, as their validity rests entirely upon the Statute.

"But after much doubt and hesitation, their Lordships have arrived at the conclusion that the notice may be entirely disregarded, and that, within the meaning of the Statute, the Letters of Request were sent in the first instance. The notice, although required by the Statute, intimates an intention to institute a proceeding; it cannot be considered a commencement of the suit: and when the Letters of Request issued, there was no suit depending in the Diocesan Court. The Letters of Request may either issue in the first instance, or after the report of the commissioners that there is a *primâ facie* case against the accused; the Legislature probably meaning, either with or without a previous inquiry, instituted by the Bishop, and understanding that, without a previous inquiry, the cause would come, in the first instance, before

the Court of Arches. Although the notice was served, there were no means of compelling the Bishop to issue the commission; and it seems to have been admitted that if, upon further information, his Lordship thought it more expedient to send the cause at once to the Arches Court, he might have done so by superseding the notice. The Letters of Request may be considered such a supersedeas.

"It has been urged before us, that this construction of the Act would subject the clergy to vexatious proceedings, both before the Diocesan Court and the Court of Appeal of the Province, but we cannot suppose that a change of intention as to the mode of proceeding will ever take place, except for the interests of justice, and the good of the Church; and it is difficult to see how the party can be prejudiced by the mere service of a notice. If the commission had issued, and he had been cited to appear under it, then their Lordships would have thought that the Letters of Request could not issue till the Commissioners had made their Report.

"The Decree, therefore, will be affirmed, but without costs.

"There is a prayer by the Respondent that the cause should be retained before the Judicial Committee of the Privy Council. Their Lordships,[1] however, are clearly of opinion that it ought to be remitted to the Arches Court. This is a Court of Appeal in the last resort, and their Lordships think that, except under peculiar circumstances, such a Court ought not to decide any cause in the first instance, as it ought to have the benefit of the discussion and judgment in the Court below, and there ought not to be an original judgment pronounced, from which there is no appeal."

The case being thus remitted to the Arches Court, was there decided on the merits. The material passages of Sir H. J. Fust's judgment are the following:—

"It is no part of the province of this Court to determine whether the Book of Common Prayer does contain erroneous doctrine; it is sufficient for this Court that it is the book which is to be used by the clergy, as prescribed by the law of the land: the question is, Are the words used in Mr. Head's letter derogatory and in depravation of that book?" . . . *Caudrey's case*[2] (5 Co. 1) "is a direct and

[1] See Introduction, p. lxxiii.

[2] See Introduction, p. xlv.

positive recognition of the power of the Ecclesiastical Court to punish, by ecclesiastical censures, or by deprivation, any person offending against the unity of the Church. There is, as has been shown, in the Act of Elizabeth, a direct recognition or preservation of the power of the Ecclesiastical Court; and, by the subsequent Act of the 13th and 14th Car. II. there is also a regular recognition of the power and authority of the Ecclesiastical Court, for the preservation of the peace and unity of the Church.

"Can the Court, then, for one moment, doubt that Mr. Head is within the jurisdiction of this Court, and amenable to his diocesan for disobedience to his ordination vow, as also that he is punishable for such disobedience by ecclesiastical censures,—can the power of the Court to suspend Mr. Head be doubted? I have no doubt whatever, either as to the jurisdiction of this Court, or that Mr. Head has brought himself within the jurisdiction. Indeed, I feel no doubt that Mr. Head is clearly within the provisions of the Statute of Elizabeth;[1] but, under the general ecclesiastical law, Mr. Head is punishable for publishing this letter, of which he openly avows himself the author.

"I therefore have no hesitation in pronouncing the articles proved; the remaining question is, what is the punishment the Court shall pronounce against Mr. Head, a minister in holy orders, and a beneficed clergyman? Now, I have referred to one part of the Statute of Charles II. s. 6, by which Mr. Head, when he took possession of his living, must, within two months, have read the Morning and Evening Prayers, appointed to be read by, and according to, the said Book of Common Prayer, and openly and publicly declared his unfeigned assent and consent to the use of all things therein contained; or, *ipso facto*, have been deprived of his said ecclesiastical benefice and promotion. I have also referred to the 36th Canon, relating to the subscription to be made by such as are to be made ministers. This is absolutely necessary to be done by every candidate for holy orders, to subscribe before he can be admitted into the ministry, or obtain possession of a living.

"I therefore think Mr. Head has incurred the extreme sentence of this Court, and that the Court would be justified in pronouncing against him a sentence of deprivation. If Mr. Head could not have obtained possession of his living without assenting or consenting to the use of all things contained in the Book of Common Prayer, he cannot complain if, by the sentence of this Court, he is placed in

[1] 1 Eliz. c. 2.

precisely the same situation as if he had not, within two months, conformed to the provisions of the Statute, and if he had not done so, he would, *ipso facto*, have been deprived. It would not, therefore, as I have before said, be a very harsh exercise of the power of the Court to impose that penalty on Mr. Head, to which he was liable, if he had not made the declaration of conformity according to the Statute. The Court, however, is not disposed to go to the full extent of its power; not from anything that exists in extenuation of Mr. Head's offence, for nothing can be more offensive than the way in which he has expressed himself in his letter; but the Statute of Elizabeth makes a difference between a first and second offence. By it, 'any person preaching, declaring, or speaking against the prescribed rites and solemnities is liable, for the first offence, to forfeit for one year the profits of all his ecclesiastical benefices, and also to be imprisoned for six months; for a second offence, he is to lose or be deprived, *ipso facto*, of all spiritual promotions, and to be imprisoned during life.' It seems, therefore, that, although it was considered, at the time the Statute was passed, that the offence would not bear much extenuation, still that it was right and proper that the Statute should make a distinction between persons guilty of one offence, and guilty of the like offence a second time. I think, therefore, that the justice of the case may be satisfied by suspending Mr. Head from his living, and from the emoluments of it, for three years. It will be borne in mind, that Mr. Head may be proceeded against for a second offence, if he shall, during the term of his suspension, publish the like doctrines.

"I am, therefore, of opinion to pronounce the articles given in to be fully proved, and to decree that Mr. Head, for the offence he has committed, be suspended from his office and ministration for the term of three years; and that he be condemned in the costs of the suit, with an admonition to him to abstain from such conduct in future.

"I think the Court would have been quite justified in going to the fullest extent of punishment, looking to the language in which Mr. Head has expressed his opinions in his letter."

LANGLEY *v.* BURDER.

1843.

THE Members of the Judicial Committee present at this Appeal were :—

THE BISHOP OF LONDON (Blomfield). DR. LUSHINGTON.
LORD CAMPBELL. " VICE-CHANCELLOR KNIGHT BRUCE.

[In this case a Clergyman, convicted of brawling in the parish church of which he was the perpetual Curate, was suspended for eight months, pursuant to the statute 5 & 6 Edw. VI. c. 4. The Arches Court declined to require a certificate of good behaviour during suspension. The sentence was confirmed by the Privy Council.]

The Rev. William Hawkes Langley, being Perpetual Curate of Wheatley, in Oxfordshire, was charged with the offence of "quarrelling, chiding, or brawling by words" in the church in which he officiated. This offence is defined by 5 & 6 Edw. VI. c. 4, which enacts (§ 1) that "if any person whatsoever shall, by words only, quarrel, chide, or brawl in any church or churchyard, then it shall be lawful unto the ordinary of the place where the same offence shall be done, and proved by two lawful witnesses, to suspend any person so offending; that is to say, if he be a layman, *ab ingressu ecclesiæ*, and if he be a clerk, from the ministration of his office, for so long time as the said ordinary shall by his discretion think meet and convenient, according to the fault." The proceeding was instituted, on the promotion of Mr. Burder, Secretary to the Bishop of Oxford, by virtue of letters of request under the Church Discipline Act (3 & 4 Vict, c. 86.)

The substance of the offence was described as follows in the 4th of the Articles of Charge :—

"That on Sunday, the 9th May, 1841, whilst he was in the performance of divine offices in the church of the per-

petual curacy, shortly before the conclusion of the Litany, after the response immediately following the prayer beginning 'Oh God, merciful Father,' he made a short pause, and instead of proceeding with the service, being wholly regardless of the sacredness of the place and of his own duty in the performance of the divine office, he, in a chiding, quarrelsome, and brawling manner, addressing the congregation then and there present, said, 'You were, perhaps, surprised at the pause I made at the end of the prayer, but it reminded me of my enemies. I have this morning received a letter from the Archdeacon, offering some clergyman to do my duty for me: some one in the congregation has had the audacity to write to the Archdeacon on the subject. Who has had the audacity to do this? Is it a Puseyite, who wants to introduce Popery into the parish? I will, however, take care they never shall, as I will do my duty myself. I have preached the Gospel, and delivered my own soul, whether the people will hear, or whether they will forbear. Some one has committed perjury against me in an affidavit made before Mr. Ashhurst; but he waited till the witnesses were dead, so that he could not be punished for his perjury. Another of my enemies has written a letter to the Bishop, full of falsehoods, to take my poor old uncle's living away; one of them has been to a dear old friend of mine, the only dear friend I have at Oxford, driving falsehoods into his ears, in order to set him against me. I have been charged with adultery; but the fact is, that, one night, as I was coming from my tenant's at Lobb Farm, I saw a drunken man ill-treating his wife, and I interfered for her protection; for my being a clergyman did not prevent my acting with humanity towards a female under such circumstances. The man told me I might be damned; what was it to me? what had I to do with it? He then struck me; but the Lord gave me power, and I knocked the man down,' at the same time using the action of striking with his fist, in illustration of the manner in which he struck the said man; that he then proceeded to say, 'If any man can prove me an adulterer, I will have my head cut off and forfeit it,' and I have before mentioned this circumstance to the Bishop;' adding, 'I pray for my enemies, and forgive them, and hope

they will repent;' that during the delivery of this address, he was in a very excited and impassioned state, and frequently struck the reading-desk and the books thereon, in a very violent manner, with his clenched fist, and by such improper and incorrect conduct, gave great offence to the congregation then assembled in the church, and reflected scandal and disgrace on his sacred profession."

The 6th Article also charges that Mr. Langley, after the Ninth Commandment, made another address, in which he spoke of the evil life of one of his enemies, and praised Her Majesty's Ministers for wishing to change the corn laws.

Mr. Langley gave in a defensive allegation, which took the ground—1. That he had but asked the prayers of the congregation, and explained the reasons for his need of them; 2. That his words had been misrepresented. He also objected to the intervention of the Bishop's secretary, as promoter of the judge's office.

This allegation having been rejected by Sir H. J. Fust, Dean of the Arches, Mr. Langley desired leave to appeal from this decision.[1] Sir H. J. Fust refused the application, stating to the Defendant that he did so on account of the irrelevancy of the grounds of his defence.

Witnesses were then examined; and the Defendant pleaded his own cause, speaking altogether for sixteen hours.

On June 27th, 1842, Judgment was given. Sir H. J. Fust first stated the form of the proceedings, this being the first case under the statute; and showed the inadequacy of the evidence produced by the Defendant. He then stated that the facts which had been proved showed a course of conduct altogether comparable to that which had in other cases[2] been held to fall under the statute against brawling. That offence might be charged either under the general Ecclesiastical Law or under the statute; for "where a statute

[1] It may be well to mention that this was, as stated by the Dean of the Arches, the first case which arose under the Church Discipline Act, 3 & 4 Vict. c. 86. That act restrains the right to appeal upon orders of the Court not having the force of definitive sentences, which had previously been allowed, and gives to the judge the discretion of allowing or refusing such appeals.

[2] Cox *v.* Goodday, 2 Hagg. C. R. 138. Hutchins *v.* Denziloe, 1 Hagg. C. R. 181.

leaves an offence as it found it, and only introduces additional punishment, a party may proceed on either."[1]

The defence which had been set up was the supposition of a conspiracy among the parishioners, but the Bishop himself was considered by Mr. Langley to be the head of this conspiracy, and there was no evidence to show that those who had reported the matter had acted otherwise than rightly. The facts then were clear: it was further clear from Mr. Langley's own statements that his action was deliberate. The plea that he was asking the prayers of the congregation was a mere pretext. There were cases, no doubt, in which the minister might rightly address the congregation, such as the necessity for removing some obstruction to the public service; but no reason of this kind had been alleged in this case. The proceedings had been impugned on the ground that they had been instituted by the Bishop's secretary instead of the Bishop himself; but this was the proper course of proceeding in a matter of this kind; and the imputations which Mr. Langley sought to connect with the fact, like other imputations made during his defence, constituted a great aggravation of his offence. The only remaining question was the degree of the punishment; and, the term of suspension being expressly left by the statute to the discretion of the judge, the Court considered that the gravity of the offence demanded suspension for eight months.

It was demanded by the counsel for the Plaintiff that Mr. Langley should not be readmitted to his duties till he could produce a certificate of good behaviour; but such a certificate, in the opinion of the Judge, though well suited for cases of intemperance, did not apply to the present offence. The Defendant was accordingly condemned in costs, and admonished to abstain in future from conduct such as that for which he had been prosecuted.

From this sentence an appeal was brought by Mr. Langley.

The Appellant appeared in person, and conducted, as in the Court below, his own case, impeaching the credit of the wit-

[1] Lord Stowell in Cox *v.* Goodday. See this principle acted upon in the cases arising out of the Essays and Reviews, p. 251.

nesses, and denying that he had been guilty of brawling, as charged in the articles.

Dr. Phillimore, who appeared for the Respondent, was not called upon to address their Lordships upon the merits.

Judgment was delivered by the Lord Bishop of London on December 4th, 1843.

"I am instructed by their Lordships to express their opinion that the articles have been substantially proved by the evidence. They are of opinion, that the Sentence pronounced by the learned Judge of the Court below on the Appellant, was not beyond what the circumstances of the case justified, and that the Appellant has shown no mitigating circumstances which can induce us to lessen the effect of that sentence. Their Lordships will, therefore, humbly recommend Her Majesty to affirm the sentence of the Court below, with costs."

SHORE *v.* BARNES.

1848.

[The case of a Clergyman seceding from the Church and continuing his ministrations. The sentence of the Court of Arches was, as in the case of Burder *v.* Langley, simply confirmed by the Judicial Committee. It decided—

1. That the fact of secession does not shield a Clergyman from Ecclesiastical censures for breach of discipline.

(The Court of Queen's Bench held the Toleration Act (1 William & Mary, c. 18) and the Act 52 Geo. III. c. 155 insufficient to give protection from censure in such a case.)

2. That an unconsecrated proprietary chapel, to which strangers are admitted, is not a private house within the meaning of the 71st Canon.

3. That to found a sentence under the Ecclesiastical law, it is not necessary that all the offences charged should be proved.

4. That the Court in awarding a penalty is not bound by the prayer of the accusing party.]

This was a suit instituted by Mr. Ralph Barnes, Secretary to the Bishop of Exeter, against the Rev. James Shore, in the Court of the present Bishop of Exeter, and removed by letters of request into the Court of Arches, for officiating in an unconsecrated chapel at Bridgetown, in the Parish of Berry Pomeroy, in the Diocese of Exeter, without the licence and against the monition of the Bishop of that diocese. Mr. Shore was admitted to priests' orders some years before this suit was instituted, and had officiated in the chapel in question with the licence of the present Bishop for some years. That licence was withdrawn, and the chapel was registered in due form under the 52nd Geo. III. cap. 155, as a Dissenting Chapel, and Mr. Shore officiated in it, professing to officiate as a Dissenting Minister, but using the liturgy of the Church of England. On November the 21st, 1844, a citation was served on Mr. Shore, who appeared under a protest, which was overruled. On May 5th, 1845, Mr. Shore gave an absolute appearance, and Articles of Charge were brought in, which were in substance as follows:—

Article 1*st.* That no clergyman of the Church of England can lawfully officiate without the authority of his Diocesan.

Articles 2*d*, 3*d*, 4*th.* That Mr. Shore being such a Clergyman, had officiated, without the authority, and contrary to the monition of his Diocesan.

The remaining Articles of Charge were formal.

The Articles of Charge were admitted, and Mr. Shore delivered, on June 19th, 1845, a defensive allegation, which was in substance as follows:—

1st. That the chapel before mentioned was a chapel for the worship of Protestant Dissenters, duly registered, under 52 George III. cap. 155.

2d. That Mr. Shore had seceded from the Church of England, and had taken the due oaths under the said Act, and therefore was entitled to the exemption given by 52 George III. cap. 155, sections 4, 5, and Stat. 1 W. & M. cap. 18, from penalties for nonconformity.

On August 5th, 1846, the admission of this allegation was opposed, and the allegation was rejected by the Court of Arches.

On the 11th of November, 1845, a rule *nisi* for a prohibition was granted by the Court of Queen's Bench, and in January, 1846, cause was shown against the rule. On the 4th of May, 1846, the Court of Queen's Bench delivered, through Lord Denman, a Judgment to the following effect:—

The fourth section of the Toleration Act (1 W. & M. cap. 18), exempting persons, who take the oaths and subscribe the declarations therein mentioned, from prosecution in the Ecclesiastical Court for not conforming to the Church of England, extends not only to lay persons but to clergymen who, having been ordained, dissent from the Church. To claim this exemption it is probably sufficient that the party states himself to be a dissenter, but a person ordained a priest in the Church of England cannot in this manner, or otherwise, at his own pleasure, divest himself of his orders so as to exempt himself from correction by the Bishop for breach of Ecclesiastical discipline. Performance by such a priest of the Church service in an unconsecrated chapel, is a

breach of discipline, and not a mere act of nonconformity protected by the Toleration Act, or by 52 Geo. III. cap. 155.

The prohibition, therefore, was refused, and the rule discharged.

On the 20th of June, 1846, the Judge of the Court of Arches (Sir Herbert Jenner Fust) delivered the following Judgment:—

"The point to which I must, in the first place, direct my attention, is to see whether the assertion of the counsel for Mr. Shore, 'That his identity is not established,' is well founded; for, unless I am satisfied, from the evidence and proceedings in this cause, that Mr. Shore, who officiated in the chapel,[1] is one and the same person, it would be a waste of time to enter into any other part of this case.[2]

"This evidence appears to be quite sufficient to establish the facts that Mr. Shore, the party proceeded against, did, after the revocation of his licence by the Bishop of the diocese, and after a monition to abstain, officiate in this chapel; that he did perform Divine offices on two Sundays, by reading Prayers and by preaching, though it is not proved he administered the Sacrament. The question then arises, whether these acts do not constitute an Ecclesiastical offence? I think it can hardly be contended that the reading of the service of the Church is not an offence by the common law of the land, after the revocation of the licence given to him as a minister of the Church of England to officiate in this chapel, *pro hâc vice*, as a church, after a full knowledge of the revocation of the licence, and of the measures taken against him by the Bishop. It was said by the learned counsel for Mr. Shore, that he did no more than his duty, as according to the Rubric of the Book of Common Prayer, every priest of the Church of England is bound every day to read the Form of Prayer, publicly or privately, and that Mr. Shore, as a minister of the Church of England, in doing so in such a place, committed no offence. This is the first time I ever heard such an interpretation put

1 *i. e.* Before and after the chapel was registered as a dissenting place of worship.

2 A passage is omitted which bears only on a question of evidence.

upon the words of the Rubric. It is right and proper, no doubt, that a minister in holy orders of the Church of England should read the Prayers in the proper discharge of the public services, or, if not, privately; but to say that he has a right to go to a place of this description—a building which had been severed from that Church, and read the Prayers there, is neither more nor less than to say that any and every clergyman (for it applies to every clergyman) may read the services daily in *public*, if he please, *anywhere;* this is a proposition to which I cannot assent. It was said that it had not been specifically proved that there was a congregation present, or that the reading of the service was in *public*. What is necessary to constitute a congregation has not been very strictly defined; but it has been commonly considered that "where two or three are gathered together" there is a sufficient number to constitute a congregation. By "publicly reading," I understand a reading to those who are present in a church or chapel. That strangers were admitted into this chapel appears from the evidence of Field, Huxham, and Gould; the two latter, as strangers, attended the service. I say, then, that Mr. Shore *did publicly* read the Prayers to those present in the chapel; that this was not a reading in a *private house*, within the meaning of the 71st Canon, as contended by Dr. Twiss. It was not the intention of the Canon that any place, not consecrated or allowed by law, should be considered a *private house;* by "private house" is meant a dwelling where a family reside. I am well satisfied that this chapel was not a *private* chapel. It is clear from the evidence in the cause, that the chapel was open to any one who thought fit to attend the services. It appears, then, to me that so much of the charge against Mr. Shore has been established as proves that this gentleman publicly read Prayers according to the Book of Common Prayer, on two separate occasions, and preached a sermon on one, though there is not sufficient proof that he administered the Sacrament. It was, however, contended in argument that, because the offence charged consists of an aggregate of three or four offences, and all have not been proved, the offence charged fails. I should like to have had some authority in this Court

for the assertion that, unless *all* the offences charged be proved, the party is entitled to be dismissed from the whole of the charge. I am of opinion that there is no authority upon which such a position can be maintained, and I have no doubt I could find cases over and over again, in which, where only one part of the charge has been made out, the party has been pronounced guilty. The case of *Hutchins* v. *Denziloe*,[1] referred to, was a proceeding under the statute: where there were different offences subjecting the party to different degrees of punishment. The case of *Titchmarsh* v. *Chapman*,[2] was a proceeding under a particular Canon for not reading the Burial Service; the Canon requires that *convenient* notice should have been given to the clergyman, which was not proved: and without that proof no offence is committed.

"I am of opinion that quite sufficient is proved against Mr. Shore to render him liable to Ecclesiastical censure and punishment. When the case came originally before the Court, the prayer at the conclusion of the articles was, that he should be admonished to abstain from performing Ecclesiastical duties or Divine offices in the chapel in question, be canonically punished according to the exigency of the law, and be condemned in the costs. As I understand, the prayer now made to the Court is not to the same effect; but I confess I am not prepared to go beyond that which is a canonical punishment; for however vexatiously Mr. Shore may have conducted himself here and elsewhere, I do not consider that I can take such conduct into the account. He is not called on to answer for the offence of seceding from the Church; for such an offence there must be other proceedings, in order to procure additional punishment; nor do I think it by any means clear that, under the circumstances of this case, I can refer to the protest, which was overruled, or to the allegation of Mr. Shore, which was rejected; though, had that allegation been admitted, and the proof thereof failed, I might have taken a different course, for I do not know that the Court is bound by the prayer; it might be in itself illegal. On a consideration of the whole case, I am of opinion that the Promoter has

[1] Cons. Rep. 181.
[2] 1 Roberts' Eccles. Rep. p. 175.

proved the articles charging Mr. Shore with having been guilty of publicly reading prayers, according to the form prescribed by the Book of Common Prayer, and of preaching in an unconsecrated chapel without a licence[1] (leaving out administering the Sacrament); that he has thereby incurred Ecclesiastical censure; and that he must be admonished to refrain from offending in like manner in future. Should he be guilty of a repetition of this offence, it will be one not only against his Diocesan, but against the authority of this Court. Though this gentleman is at this moment a minister of the Established Church of this land, from which office he cannot of his own authority relieve himself, still I do not think I am entitled to depose him from the ministry. I content myself by pronouncing that the articles have been sufficiently proved. I admonish Mr. Shore to abstain from offending in like manner in future, in the parish of Berry Pomeroy, and in the diocese of Exeter, and elsewhere in the province of Canterbury; and I condemn him in the costs."

On an appeal being brought by Mr. Shore from this sentence to the Judicial Committee of the Privy Council, the Judgment of the Court below (the Court of Arches) was confirmed on the 14th February, 1848.

[1] This, and not the fact of secession or non-conformity, was the offence charged against Mr. Shore. Lord Denman held that, in order to gain the exemption provided by the Act of Toleration, it would be necessary for Mr. Shore to show that he had been sued in the Ecclesiastical Court for non-conformity; and that, though that Act would exempt him from liability to any penalty for not conforming to the Church of England, yet neither that nor any other act would absolve him from canonical obedience to the Bishop in regard to anything he might do according to the rights and ceremonies of that church.

CRAIG *v.* FARNELL.

1849.

THE Members of the Judicial Committee present at this Appea were, at the hearing of the application :—

THE BISHOP OF LONDON (Blomfield).
LORD BROUGHAM.
LORD LANGDALE.
DR. LUSHINGTON.
T. PEMBERTON LEIGH.

At the hearing on the merits :—The BISHOP OF LONDON (Blomfield), LORD BROUGHAM, LORD CAMPBELL, DR. LUSHINGTON.

[In this case, being an Appeal from the Arches Court, in a suit against a Clergyman for immorality, the Court refused to receive additional articles, charging the Defendant with fresh offences, committed since the Judgment was delivered in the Court below.]

The proceedings which led to this Appeal were instituted at the promotion of Mr. George Rooke Farnell, of Burley Park, against the Rev. John Kershaw Craig, Clerk, Minister of the new church of St. John the Baptist, at Burley, in the county of Hants, for acts of adultery, fornication, or incontinence.

A preliminary inquiry took place at Ibsley, before Commissioners appointed by the Archbishop of Canterbury, in accordance with the provisions of the Church Discipline Act, the Bishop of Winchester, Mr. Craig's Diocesan, being the patron of the living. Four of the five Commissioners, including the Rev. Mr. Yonge, the Rural Dean, met in April, 1845, to conduct the inquiry, and the result was an unanimous report from the Commissioners that there was a sufficient *primâ facie* case to call for further inquiry.

On the 29th November, 1845, the cause was brought to the Court of Arches by letters of request from the Bishop of Winchester. Whereupon a Citation was issued which the officer of the Court attempted to serve on Mr. Craig; but he, being in his house at the time, locked the door and prevented

the service thereof. On the 12th of December, the officer made his return, with a certificate and affidavit that actual service could not be made. A Decree by Ways and Means was immediately issued at the petition of the Promoter, returnable on the 30th December.

No appearance having been given in the first instance to the Citation from the Court or to the Decree by Ways and Means, the Court was moved, on January 12, 1846, to pronounce Mr. Craig in contempt, which was accordingly done; but in the course of that day, during the sitting of the Court, he appeared personally and prayed Articles; upon which occasion the Judge stated that he had received from him a very improper letter.

The Articles, which were admitted without opposition, pleaded *inter alia*, as follows:—

That the Defendant had committed adultery with Jane Shelley in Ridley Wood.

That he had gone down into his kitchen and there taken improper liberties with Ann Smith and with Jane Shelley.

That he had entered the bedroom of his servants, Amelia Jane Archer and Charlotte Sims, and there behaved himself indecently and committed adultery.

Mr. Craig in answer alleged, that Mr. Farnell entertained a great personal feeling of ill-will against him, and that all the charges had been maliciously brought by Mr. Farnell; he also alleged perjury on the part of the witnesses; and further he specifically denied each charge of adultery, fornication, or indecency.

Subsequently, Mr. Farnell pleaded a further Allegation, that Mr. Craig had been and was in the habit of performing his public ministrations in an irregular manner; that he had allowed the clerk to be in the reading-desk with him, and to read the lessons, and had on many Sundays omitted to read certain parts of the service; that, in consequence, there was a decrease in the attendance at school and church; that Mr. Farnell had not manifested a feeling of ill-will and enmity towards Mr. Craig, and that he had exhibited the Articles at the instance and request of the Bishop of Winchester. The further Allegation of Mr. Craig denied Mr. Farnell's further

charges, except as follows:—That the reading of the lessons by the clerk from his own desk in the morning (but never in the evening) service had been continued in consideration of Mr. Craig having been long subject to hœmorrhage, and of the fatigue occasioned by the walk of twelve miles every Sunday; that Mr. Craig omitted to read certain parts of the service only on one Sunday, in 1842, and then only in consequence of domestic anxiety.

On January 21, 1847, a motion was made to the Court to give the Defendant access to certain papers connected with the case deposited in the office of the Registrar of the Vicar-General, and, more particularly, to a letter of accusation alleged to have been written by the Promoter to the Bishop of Winchester some time prior to the 17th of January, 1845. Sir H. Jenner Fust refused the motion, remarking, *inter alia*, "That it was a motion of an unusual nature." He added, "In the present case the Bishop, being the patron of the preferment, sent the case by letters of request to this Court, and all the papers were sent to the Registry of the Vicar-General; but they are not to come here unless they form part of the proceedings before the Commissioners; and as I have already said, it appears in the case itself, there is not one charge in this letter upon which these proceedings are founded..... Had this letter been before the Commissioners, it must have been brought in."

On November 11th, 1847, Sir H. Jenner Fust pronounced Judgment. He first stated the nature of the case, and then regretted the delay that had occurred. "Upon this part of the case," he said, "the Court is of opinion that there is nothing in the way of grievance to be complained of by Mr. Craig, and that for the delay from November, 1845, to January, 1846, he is himself the party to blame, if blame is to rest anywhere..... It is not denied that if the facts charged against Mr. Craig by the Promoter are proved, they amount to a gross violation of decency in any man, and especially in a clergyman, and that they render him amenable to ecclesiastical law. The defence of Mr. Craig is, that these charges are not only altogether false and unfounded, but that they have been maliciously brought forward by Mr. Farnell."...

"The question upon which the whole case turns is, whether Mr. Craig is to be considered guilty or not guilty of the offences imputed to him; whether the evidence of the witnesses in support of the charges is sufficient to call upon the Court to pronounce that the Promoter has succeeded in establishing them."

The Judge went on to remark on the Defendant's good character before he came to Burley, and on the direct conflict of testimony as to the acts imputed to him, throwing on the Court the responsibility of weighing the manner of witnesses, the probabilities of their stories, and their possible motives, against each other, and of attaching the stigma of shameless perjury to one side or the other.

He continued:—"There are three particular facts in this case, namely, the adultery alleged to have been committed in Ridley Wood; the transaction between Mr. Craig and Ann Smith on the 19th October, 1844; and what occurred as alleged between him and Amelia Jane Archer, in December, 1844, and January, 1845."

After reviewing the evidence of William White, who deposed to the transaction in Ridley Wood, and that of Jane Shelley, and other witnesses, who were called to deny the fact, and show that it could not have taken place, Sir H. J. Fust said:—"On this point of the case, the Promoter has failed in proof of the Articles relating to it."

He then reviewed the next charge—that of taking indecent liberties with Ann Smith and Jane Shelley on the 19th October, 1844, and said:—"I am of opinion on the whole of this part of the case that it is established as pleaded; that Mr. Craig did go down to his kitchen and there tickle Jane Shelley, and did pull back the chair of Ann Smith, and put his arms round her neck, or on her shoulder, and kiss her; and I am therefore of opinion that the 10th and 11th Articles are established by the evidence produced to support them."....

Upon the last charge, as spoken to by Amelia Jane Archer, who was in part confirmed and in part contradicted by other witnesses, he said:—"Upon the whole, on her evidence, I do not think I am at liberty to say that the proof is so satisfactory to my mind as to call upon me to pronounce that the charge

is clearly established. But I do not think it is disproved; I do not think it is an invention, and I cannot say that there is no suspicion attaching to Mr. Craig on this part of the case."

In passing sentence under these circumstances, the Judge stated that he felt some difficulty as to the measure of punishment to be inflicted upon the Defendant. "If the charges had been proved altogether, there must have been a sentence of deprivation; for there could be no doubt what would be the effect of such conduct in the parish, and he would not have been a fit person to remain in charge of such a parish as this; but it being only proved that he has conducted himself as he has done towards Ann Smith, the question is, what sentence the Court shall pronounce. And this, with respect to the costs, is a very material question, for the costs will be very heavy. I hold that the Promoter has proved sufficient to justify the institution of proceedings in this Court; I think that Mr. Farnell has proved that he has not come forward with wicked and malicious motives, and that Mr. Craig has given occasion to these proceedings. I therefore suspend Mr. Craig from the performance of duty and from the emoluments of his benefice—*ab officio et a beneficio*—for two years from the date of this sentence, and until he shall produce the usual certificate; and I must condemn Mr. Craig in some part of the expense of the proceedings here, but as it is impossible to say what part has been incurred by each charge, I shall condemn Mr. Craig in £250, *nomine expensarum*. I pronounce that the Promoter has failed in proof of the 4th, 5th, 6th, 7th, 8th, and 9th Articles, and that the remainder are sufficiently proved."

From this sentence the Defendant appealed, and the Promoter adhered to the appeal.

On the 13th of February, 1849, before the appeal was heard, an application was made to the Judicial Committee on behalf of the Respondent (the Promoter), to rescind the conclusion of the cause, for the purpose of receiving additional Articles, and also to direct the attendance of the witnesses produced in the Court below on behalf of the Appellant, in order that they might be examined *vivâ voce*. He grounded his first motion principally on two affidavits made by Moses

Sims, formerly a servant in the employ of the Appellant, purporting to establish fresh acts of adultery, which were met by counter-affidavits by the Appellant and others. The second motion was supported by affidavits, alleging that the Appellant had tampered with the witnesses before their examination in the Court below.

After hearing counsel for the Respondent only, Judgment on this application was delivered by Lord Brougham on the 13th of February.

"This Court ought to be slow to re-examine witnesses; besides, the affidavits in support of the motion furnish no facts on which the Court can rely; mere suggestions only are offered. There is no direct swearing as to the actual occurrence of the alleged tampering, and we are asked to try a question of fact, as to the conduct of a party towards witnesses, which fact could not have been in the knowledge of the Court below. If a principal witness had, in the interim of the decision of the Court below and the appeal here, been convicted of perjury, there might be ground for such an application as is now made; but in the present instance, it is a most inconvenient course that this Court is asked to adopt, and one greatly calculated to prejudice the case before us. Has there ever been a case, between the decision of the Court below and the appeal, in which this Court, or any Court of appeal, has been called upon to question evidence that must materially prejudice the case on appeal? No case, or authority, has been shown us in support of this application, that we have power to do what is asked; and even if we had such power, it has not been shown, that the circumstances are such as to justify the exercise of it. We have no hesitation whatever in refusing both applications, and with costs. We say not a word upon the merits of the case, we only dispose of this interlocutory application."

The case was then argued on the evidence taken in the Court below, on the 1st, 5th, and 6th of March.

On the 20th of March final Judgment was delivered by Lord Brougham:—

"It becomes unnecessary to inquire whether the charge of incontinence in the Citation, following that of fornication and adultery, is to be regarded as confined to sexual intercourse and solicitation of chastity, or is sufficiently broad to cover all indecency of demeanour, which might have been separately and distinctly libelled. No objection was taken below to the admission of the Articles as not comprised within the citation, nor to the evidence taken on the Articles, on the ground that these Articles and that evidence only meant to charge the Rev. Defendant with impropriety of conduct, and stopped short of any unchastity or solicitation of chastity. It would, therefore, in any view, have been extremely inconvenient had we been called upon, for the first time in this Court of Appeal, to pronounce upon that point; and for this among other reasons,—that the objection, if taken below, and if below it had prevailed, might have let in the Promovent to amend his proceeding, so as to introduce a more appropriate head of charge. But the opinion at which we have arrived upon this branch of the case will render it wholly unnecessary to deal with that question in any way.

"The charges before the Court below were these three: First, adultery and fornication committed with Jane Shelley in a wood; *secondly*, indecent behaviour towards Charlotte Sims and two other females in their bed-room; and thirdly, acts of indecency and impropriety with Ann Smith and Jane Shelley in his own kitchen.

[Lord Brougham here entered into a minute examination of the evidence on the two former charges, which had been dismissed, on different grounds, by Sir H. Jenner Fust. As to both of these charges he confirmed the Judgment of the Court below.]

"The whole charges of the more grave description are thus to be rejected; and we cannot, in a criminal case, draw a distinction between accusations not proved and accusations disproved, or suffer any prejudice to remain on our mind in examining the remaining charge, from the recollection of those charges which we have on mature deliberation rejected; still less can we suffer any reference to those rejected charges to influence our belief of the rest. Were this kind of reasoning to be suffered,

a party would only have to accumulate many accusations which he could not support by proof, with the view of helping himself in gaining credence to those in support of which he had some, though imperfect evidence to offer. The accused party has an absolute and incontestable right, in every Court of Justice, to require that the unproved matters be considered as wholly rejected, and to defend himself from those still in question as if they stood alone.

"Thirdly, there remains, therefore, to be considered only the third head of charge, indecent demeanour in the kitchen towards Ann Smith and Jane Shelley, kissing one and tickling the other's knees,—demeanour of which the evidence of Ann Smith is the only proof offered for our consideration.

"First, we must remember that the denial of a party accused, being set against a single witness, is to be regarded as of some, though by no means conclusive, effect. But this remark applies to every case that rests on a single witness, and it only leads to the conclusion that we must always carefully sift the credit of such unsupported testimony. Here we are without any evidence tending to throw discredit on the general character of the witness Ann Smith; and we may also observe that her testimony contains nothing within itself inconsistent,—at least, no material inconsistency,—while the improbability of the story told is much less striking here than in respect of the other and graver heads of accusation already disposed of, and on which we agree with the Court below. Nevertheless, Mr. Craig has even here a right to the benefit derived from the excellence of his previous character during a course of years, and from the terms of confidence and affection on which he lived with his wife.

"It must, in the outset of our examination, be further stated, that Jane Sims, a dismissed servant, was the active instigator of these whole proceedings; that is, the earliest distributor of the stories on which the proceedings were grounded; and that Ann Smith only told of this kitchen scene after that person, Jane Sims, had been reporting matters of far blacker character. Jane Sims's account, indeed, of these matters is wholly out of the case; it was of itself utterly incredible, and it was marked by the greatest

malignity, as well as the grossest falsehood. Ann Smith first mentioned the kitchen scene to White, the letter-woman, at Christmas, 1844—on Christmas Day, she says; and Jane Sims told her of Mr. Craig having seduced herself, Jane Shelley, and Charlotte Sims, some days at least before, but probably a longer time. Ann Smith choosing Mrs. White for the first depository of her own story, is also somewhat remarkable. Mrs. White was the wife of William White, whose incredible and malicious story has been remarked upon, and whose activity in this case has been throughout remarkable. His wife went to Mr. Farnell, as soon as she heard Ann Smith's story, and told it to him; so that Ann Smith was immediately sent for by that gentleman.

"It is further to be observed, that Ann Smith told her story piecemeal. At first, to Mrs. White, she said nothing of tickling Jane Shelley's knees, which she first told to Mr. Farnell. Now the probability is, that she should rather have told the greater than the lesser impropriety, and rather the impropriety towards another than that committed on her own person—a remark suggested by this, that she burst into tears in relating the latter impropriety, that committed on her own person, to her mother. Again; she further increases the story in the course of her cross-examination, for in her answers to the 13th additional Interrogatory she volunteers, for the first time, a statement that Mr. Craig, all the time he was in the kitchen, 'talked in a way that it was not decent for any one to talk;' a great charge against him, nothing of which she had ever told either her mother, or Mrs. White, or Mr. Farnell himself, or any one else, and nothing of which the 13th Interrogatory led her particularly to mention.

"It seems that, when these circumstances are all well weighed, as affecting the credit of this witness, there would be a great hazard of misdecision were we to rely on her testimony rather than on that of the two witnesses whom her statement vouches as present, and who peremptorily contradict the whole in every particular, besides swearing to her having held light language with respect to Mr. Craig, and which she, on her part, particularly denies upon her oath.

"Now, if the contradiction of Ann Smith's account had rested on the evidence of Jane Shelley alone, who may be supposed to have a greater interest in denying the indecencies offered to her than Ann Smith in denying the insult offered to her, we might be disposed to prefer Ann Smith's testimony to Jane Shelley's; but Maria Sims, who is wholly beyond the scope of any such criticism, gives as peremptory a denial as Jane Shelley, and we cannot perceive any sufficient reason to disbelieve her from the supposed concealment, referred to by the Court below, of a part of the statement, and her afterwards, on the Examiner pressing her, admitting it. It is fit to observe that her reluctance to admit this until closely interrogated may have arisen from a wish to screen her sister. But, still further, we may observe, that, the denial first given is most minutely connected with the particular occasion to which the 59th Interrogatory most specifically refers. It is necessary to mention this, because it is upon this circumstance that the learned Judge in the Court below proceeded to discredit Maria Sims. The interrogatory is as follows:—'Let Maria Sims be asked, "Were you not staying at the house of Eli Sims, shortly before the execution of the commission at Ibsley? Were you not there (that is the house of Eli Sims) when your sister, Jane Young, went to the Ministrant's house, to be examined by him? Did you not say, with reference to the rumours respecting the Producent, that you yourself knew no harm of Mr. Craig? Did not your sister Jane say, 'How can you say that before me?' Did not you say, 'Well, I do know no harm?' Did not your sister thereupon say, 'Don't you recollect that evening when you were walking up and down the kitchen, Mr. Craig persuaded me to prevent your going home that night, and he came to our bed?' Did you not reply, 'Well, if he did, you knocked for him?' Will you solemnly, and by all your hopes of salvation, swear that you and your sister Jane did not, on the occasion aforesaid,"'—a most minutely-described occasion,—'"or on some other occasion, express yourselves respectively to the effect interrogate? Were not Eli Sims and his wife present on the occasion?" which makes it the one occasion. A more minute interrogatory one can hardly conceive. Now here is the

answer:—'I was not stopping at Eli Sims' house shortly before the commission at Ibsley. I've never stopped there; but I used to go there two or three times a-day, and so I do now. I was not at Eli's house when my sister Jane went to the Ministrant's house to be examined by him; for I remember when she went and when she came back again, and I was at home then; but I remember, when I went up to the Ministrant's to be examined, Eli came in to tell me, and I went into his house to wait whilst he got ready, I suppose; and I know that my sister Jane was in there, and Eli's wife, but I don't recollect anybody else; I know there wasn't, though. And after that, Eli took me up to Mr. Farnell's. I did say, on that occasion, that I knew no harm of Mr. Craig; but my sister Jane did not answer, "How can you say that before me?" but I think she said, "You know you do," and I dare say I said again, that I didn't know any harm of him; but I will solemnly swear that she didn't say to me, "Don't you recollect that evening when you were walking up and down the kitchen, Mr. Craig persuaded me to prevent your going home that night, and he came to our bed?" or that I replied, "Well, if he did, you knocked for him."' (The witness was here reminded of her oath, and solemnly enjoined, by all her hopes of salvation, to speak the truth, and she then said,) 'My sister Jane, when she was on Mr. Farnell's side, often said to me, and I remember also in the presence of Eli and his wife, "Don't you recollect that evening when you were walking up and down the kitchen, Mr. Craig persuaded me to prevent your going home that night, and he came to our bed?" but I don't think she said so the time I was going up to Mr. Farnell's,'—as to which she had particularly sworn in answer to the 59th Interrogatory before:—'I am sure she didn't—I can't recollect whether she did say so that time; or whether she didn't. I won't swear she didn't. By all my hopes of salvation, I solemnly swear that I never, on any occasion when my sister Jane said so, answered, "Well, if I did, you knocked for him." I also solemnly swear, by all my hopes of salvation, that nothing of the kind ever occurred, as that Mr. Craig persuaded my sister Jane to prevent me going home at night, and then came to our bed. I don't know why my sister Jane invented

such a falsehood; but I've no call to speak more for Mr. Craig than for Mr. Farnell; they are both all the same to me.' So far as to Maria Sims.

"There are other contradictions of Ann Smith on which it is, perhaps, not necessary to dwell, though her explanation, when examined on them,—as that there were words spoken lightly, to get rid of troublesome inquiries,—is not sufficient, because, on one occasion, she gives another reason, and a reason inconsistent with fact; and Bromfield's deposition is entirely at variance with hers in every particular, Bromfield being a witness whose cautious and collected manner of deposing to the interrogatory entitles him to respect. To the 15th Interrogatory Ann Smith deposes: 'I recollect the occasion when he (Bromfield) asked me about Mr. Craig's having kissed me. He was talking about it all day.' She says that three times: 'He was putting it to me all day when I came in his way,—"What, the parson did kiss thee, Nanny?" He was joking and putting it at me all day, and I got angry, and said he didn't. I was angry, and said it to stop him.' When this evidence is compared with that of Bromfield, it will be found at variance with Bromfield's statement in many most essential particulars. He swears that Ann Smith commenced the conversation of her own accord. His words are: 'She said this entirely of her own accord, without my starting any subject at all.' He says that he had not been joking or putting it at her all day long, or at all; that he knew nothing about the matter till she mentioned it herself; that she spoke quite seriously, but not angrily, 'and it was not to stop any inquiry. Upon comparing the evidence of Bromfield with the article on which he has been examined, it will be found that he is a careful and discriminating witness, and not inclined to follow the whole article.

"There is another direct contradiction in the evidence of Ann Smith, on the 16th Interrogatory, comparing that evidence with the evidence of William King.

"We are further to remember that she appears to have applied for an engagement in Mr. Craig's house, though she denies that, after the facts alleged to have happened. To this Charlotte Sims gives a very minute and direct testimony as

to Ann Smith having wished to go back, and she is not cross-examined to it. And, lastly, Ann Smith did not cease going to church, apparently (though there is some doubt about this), notwithstanding her statement that the Defendant's conduct made her decline to do so; for she says she went to his church till within a month of her going to Musclift, which must have happened, in all probability, much more than a month after the 19th October, when the scene in the kitchen is fixed to have happened, if it happened at all.

"We do not, therefore, feel justified in adopting this single unsupported witness's evidence, open as it is to these objections, and positively contradicted by the two other witnesses vouched; and if it be said that her swearing to an affirmative ought to prevail over those who only deny, and who may have forgotten, or may not have observed, we are to bear in mind that the question is not of words spoken, but of acts openly done, and done so as of necessity to have been seen by all present, and, of like necessity, acts of such a kind as to have attracted by their nature their special notice. And, moreover, we are to recollect that one of the same witnesses who negatives her story,—thereby swearing negatively, no doubt,—also swears affirmatively to her having spoken certain remarkable words which she on her part most positively denies.

"On the whole, we are of opinion that the evidence is insufficient to support this charge, and that the decision of the Court below must be reversed. This is the opinion of the majority of their Lordships.

"We cannot avoid adding (and in this all their Lordships are entirely agreed) our distinct reprobation of the kind of interrogatories which have been administered on both sides, and which are wholly inconsistent with every principle in the known law of evidence. Such a course of interrogatory is contrary to all rule, and repugnant to all principle: it is to be severely reprehended. We have no reason to suppose, and we cannot believe, that such a course is sanctioned by any practice; but if it were so, we should be ourselves to blame did we not at once and authoritatively declare such to be *mala praxis*, and were we not to require its immediate and entire discontinuance.

"The sentence of the Court, therefore, is to reverse the decision of the Court below, so far as regards the adoption of the charges against the reverend gentleman, and the £250, the sum given for costs by that judgment. The Decree, therefore, which must be the same here as ought to have been given in the Court below, will be to pronounce against all the Articles as that none of them are proved. But neither in the Court here, nor in the Court below,—regard being had to the whole circumstances of the case, including the bad interrogatories, seventeen being wrong on the one side, and eight wrong on the other,—do we say anything of costs.

GORHAM *v.* THE BISHOP OF EXETER.

1850.

THE Members of the Judicial Committee present at this Appeal were :—

LORD LANGDALE.	DR. LUSHINGTON.
LORD CAMPBELL.	SIR J. L. KNIGHT BRUCE.
SIR JAMES PARKE.	MR. PEMBERTON LEIGH.

The ARCHBISHOPS of CANTERBURY (Sumner) and YORK (Musgrave), and the BISHOP of LONDON (Blomfield), assisted by special command of Her Majesty.

[This case being the first in which the limits of clerical liberty, in matters of doctrine, were brought under the cognizance of the Judicial Committee, has been cited ever since as the leading case on the construction of the formularies of the Church of England in proceedings involving questions of a like nature.

The following principles were laid down in the course of the judgment :—

1. The question which the Court has to consider is, not whether the opinions impeached are sound or unsound, but whether they are contrary and repugnant to the doctrines which the Church of England, by its Articles, Formularies, and Rubrics, requires to be held by its ministers.

2. The Court applies to the Articles and Liturgy the same principles of construction which are by law applicable to all written instruments, assisted only by such external or historical facts as it may find necessary to enable it to understand the subject-matter to which the instruments relate, and the meaning of the words employed.

3. In all cases in which the Articles considered as a test admit of different interpretations, it must be held that any sense of which the words fairly admit may be allowed, if that sense be not contradictory to something which the Church has elsewhere allowed or required.

4. If there be any doctrine on which the Articles are silent or ambiguously expressed, so as to be capable of two meanings, we must suppose that it was intended to leave that doctrine to private judgment, unless the Rubrics and Formularies *clearly* and *distinctly* decide it.

5. Devotional expressions (in the Services) involving assertions, must not, as of course, be taken to have an absolute and unconditional sense. The meaning must be ascertained by a careful consideration of the nature of the subject, and the true doctrine applicable to it.

6. The whole Catechism requires a qualified or charitable construction. The Services abound with expressions which must be taken in a charitable or qualified sense, and cannot, with any appearance of reason, be taken as proofs of doctrine.

7. The Court does not affirm that the doctrines and opinions of eminent divines can be received as evidence of the doctrine of the Church of England; but their conduct, unblamed and unquestioned as it was, proves at least the liberty which has been allowed of maintaining such doctrine.]

The Rev. George Cornelius Gorham, the appellant, was sometime Fellow of Queen's College, Cambridge. He was ordained priest in 1812, and officiated as a curate in six dioceses. He was a Bachelor of Divinity, and is stated to have served without reproach in the Church up to the time of the proceedings which led to the present Judgment. In 1846 he was presented, by Lord Chancellor Lyndhurst, to the living of St. Just, near the Land's End, in Cornwall, in the Diocese of Exeter. On that occasion he was instituted without any hesitation on the part of the Bishop of Exeter. But between that time and his presentation to Brampford Speke (which gave rise to the present case) he had incurred the suspicion of the Bishop on account of some expressions[1] employed by him in advertising for a curate, and in soliciting subscriptions for a school, which appear to have led to some correspondence between the two parties. When, therefore, he was offered, in June, 1847, by Lord Chancellor Cottenham, the living of Brampford Speke, in the gift of the Crown, and required, according to the usual practice in such cases, to forward to the Lord Chancellor a testimonial signed by three beneficed clergymen, the Bishop, being asked to countersign the testimonial, wrote, in the margin of the document, the following words :—

"The clergymen who have subscribed this Testimonial are highly respectable; but, as I consider the Bishop's countersignature of such a document, if it be unaccompanied by any remark, as implying his own belief that the party to whom it relates 'has not held, written, or taught anything contrary to the doctrine or discipline of the United Church of England and Ireland:' and, as my own experience unfortunately

[1] The points to which the Bishop took exception, as stated by Mr. Gorham (Moore's Report, p. 7), were—1. Using the term "National Establishment" in a circular relating to the new church at Pendeen. 2. Advertising for a Curate "Free from Tractarian Error." 3. Protesting against the Bishop's declaration that he would institute particular inquiry into any Curate nominated by Mr. Gorham, and against his imposing a private test as to Baptism on Mr. Gorham's nominee. 4. Mr. Gorham's acknowledgment that he had protested against being subjected to a similar attempt when ordained priest.

attests, that the Rev. George Cornelius Gorham did, in the course of last year, in correspondence with myself, hold, write, and maintain what is contrary to the discipline of the said Church, and as what he further wrote makes me apprehend that he holds also what is contrary to its doctrine, I cannot conscientiously countersign this Testimonial."

The Bishop, after receiving Mr. Gorham's remonstrance, having refused to withdraw the words written upon the testimonial, Mr. Gorham explained the circumstances to the Lord Chancellor, who thereupon ordered the presentation to be made out, and wrote to the Bishop of Exeter, October 11th, stating that, as he had received adequate testimonials to Mr. Gorham's good character, he thought that whatever power the law might give to the Bishop upon the ground of life or doctrine, must follow, and not precede presentation. The presentation was accordingly made out, November 2nd.

Mr. Gorham upon this applied to the Bishop for institution, and, after some correspondence as to the time at which the Bishop could see him, the Bishop notified to Mr. Gorham, on November 13th, that he felt it his duty to ascertain, by examination, whether he were sound in doctrine, before giving him institution.

The Bishop having been called to London by a meeting of Parliament, the examination was postponed till November 17th. It then commenced, and lasted for six days, at the close of which Mr. Gorham protested against its continuance, on the ground that his doctrine had been sufficiently tested, and that the examination was becoming over minute and inquisitorial. It was, however, resumed for three days on March 8th, 1848, and terminated March 11th. The questions were partly set and answered on paper. When the *vivâ voce* method was used, the examination was taken down by the Bishop's chaplain and by Mr. Gorham, and the whole was published by Mr. Gorham, and acknowledged as a true account of the proceedings by the Bishop, who incorporated the book in his Act on Petition to the Court of Arches.

The examination consisted of 149 questions, most of which were answered by Mr. Gorham, who, however, declined to

answer a few of them, on the ground of what he considered their irrelevancy or inquisitorial character.

The passages which afterwards became the real subject of litigation, are chiefly contained in Mr. Gorham's answers to Questions V. VI. and VII. in which he apparently endeavoured to sum up his views on the doctrines at issue, and on which almost the whole of the subsequent examination was founded.[1]

"Q. V.—Does our Church hold, and do you hold, that every infant baptized by a lawful minister, with water, in the name of the Father, and of the Son, and of the Holy Ghost, is made by God, in such Baptism, a member of Christ, the child of God, and an inheritor of the kingdom of heaven?"

"Q. VI.—Does our Church hold, and do you hold, that such children, by the laver of regeneration in Baptism, are received into the number of the children of God, and heirs of everlasting life?"

"Q. VII.—Does our Church hold, and do you hold, that all infants so baptized, are born again of water and of the Holy Ghost?"

"A.—As these three Questions all imply the same description of Answer, I will discuss them together:—

"— And, generally, I reply, that these propositions, being stated in the precise words of the Ritual Services, or of the Catechism, undoubtedly must be held, by every honest member of the Church, to 'contain in them nothing contrary to the Word of God, or to sound doctrine, or which a godly man may not with a good conscience use and submit unto, or which is not fairly defensible, ... if it shall be allowed such just and favourable construction as in common equity ought to be allowed to all Human Writings, especially such as are set forth by authority.' (Preface to the Book of Common Prayer.)

"Now, the 'just and favourable construction' of passages like these (occurring in Services intended for popular use), which, taken in their naked verbality, might appear to contradict the clearest statements of Scripture, and of the Church

[1] The notes on Mr. Gorham's Examination are his own.

herself, must be sought—chiefly, I. by bringing them into juxtaposition with the precise and dogmatical teaching of the Church in her explicit standard of doctrine, the XXXIX. Articles; in the next place, II. by comparing the various parts of her Formularies with each other;—and, collaterally, III. by ascertaining the views of those by whom her Services were reformed, and her Articles sanctioned.

"The real point involved in these Questions is, the efficacy of the Sacrament of Baptism, not merely in Infants, but in Adults; and that Question cannot be fairly dissevered from the efficacy of the other Sacrament, that of the Lord's Supper.

"I. The Articles distinctly, and with severe precision, lay down the doctrine for both Sacraments; which is this:—that, not right administration merely, but worthy reception, is essential to their becoming 'effectual Signs of grace.' 'In such only as worthily receive the same, they have a wholesome effect or operation.' (Article XXV.) And 'the grace of God's gifts' is said to be conferred only on such as 'by faith, and rightly, do receive' them. (Article XXXI.) The doctrine thus generally stated, for both kinds, applies to Baptism of course; and of that Sacrament it is, *eo nomine*, declared, that 'they that receive Baptism rightly' (that is, not merely by lawful administration, but by worthy reception), 'are grafted into the Church; the promises of forgiveness of sin, and of our adoption to be the sons of God by the Holy Ghost, are visibly signed and sealed; faith is confirmed, and grace increased by virtue of prayer unto God.' (Article XXVII.) No distinction is made between adults and infants in this Article; though the case of the latter was expressly in the minds of its framers, as appears by the charitable declaration at its close. 'The Baptism of young children is in any wise to be retained in the Church, as most agreeable with the institution of Christ.' Yet, once more; the three remarkable expressions above cited, are combined in Article XXVIII. in which the doctrine of the Church is luminously set forth, as in a sunbeam, that none have a beneficial communion of the body and blood of Christ, but 'such as rightly, worthily, and with faith, receive the same.' See also Article XXIX. 'The wicked, and such as be void of a lively faith, although

they do carnally and visibly press with their teeth (as St. Augustine saith) the Sacrament of the Body and Blood of Christ, yet in no wise are they partakers of Christ; but rather to their condemnation do eat and drink the Sign or Sacrament of so great a thing.'

"Such—according to the authoritative teaching of the Articles,—(those grave and formal declarations of Divine Truth, accepted by both Houses of Convocation)—by which the language of all Formularies, and Services, as well as all Expositions, and Examinations of their import, must be rigorously tested, as their standard,—such is the doctrine of the Church on the efficacy of both Sacraments, and, therefore, of Baptism—Where there is no worthy reception, there is no bestowment of grace.

"II. The Formularies teach the same doctrine when fairly construed; though sometimes in a form less definite.

"1. In the Catechism, 'the inward and spiritual Grace' is carefully distinguished from the 'outward and visible Sign,' which is its token, its pledge, and its manifestation, when 'rightly received.' The conditions of 'repentance and faith' are expressly required of persons to be baptized, even of infants; who must enter into these stipulations by their representatives; and who, 'when they come of age, are bound to perform' the covenants which their sponsors have made on their behalf.

"2. In the Baptismal Services (for adults as well as infants, for we are not at liberty to sever the two in this argument), the benefits of the Sacrament are, in a similar way, suspended on its worthy reception. 'Faith' and 'repentance' are declared by the adult in his own person, and are stipulated by the infant, through its sponsors, as dispositions which exist, or shall hereafter exist, in the mind of the candidate. The whole Service, therefore, is constructed on the assumption that these promises are sincere, on the hypothesis that the requirements have been, or shall be, performed. In this charitable hope the Formularies of the Church affirm, that the subject of Baptism is, 'a member of Christ, the child of God, and an inheritor of the kingdom of heaven.' (Question V.) He was made such,—by solemn dedication with the prayers of the Church,—by

open profession with his own lips,—or by the stipulations of his sponsors—(to be hereafter, possibly as soon as the infant faculties are sufficiently developed, or at all events in riper years—fulfilled by himself); and he was also made such by the covenant of God, certified by His own seal, that on His part nothing should be wanting to give His adopted child the full effect of these blessings. This interpretation of the affirmations in the Baptismal Ritual is confirmed by the language of one of the Homilies, which reminds us, that 'by holy promises, with calling the name of God to witness, we be made lively members of Christ, when we profess His religion, receiving the Sacrament of Baptism.' (Homily on Swearing, Part I.) It is in the same prospective confidence in the sincere performance by infants, of those engagements by which they were bound by their sureties, (as their ripening capacities shall enable them to fulfil those pledges,) that the Church declares (—but always with an implied conditional reservation, if these promises be not fulfilled, that the blessing is not conferred—) that 'by the laver of regeneration in Baptism they are received into the number of the children of God, and heirs of everlasting life.' (Question VI.) In the same strain of charitable hypothesis, it is affirmed that infants 'so baptized,' namely, not according to the institution of Christ, but with 'the stipulation [—the answer—] of a good conscience towards God,' are 'born again of water and of the Holy Ghost' (Question VII.): it being impossible that such dispositions and fruits should exist, except when the Holy Ghost has imparted a new nature; which He may do before Baptism, in Baptism, or after Baptism, 'as He listeth.'

"That the Church did not intend her language to be construed absolutely and unconditionally, may appear from a single instance.

"In the Office for 'Private Baptism,' the Church makes two declarations as absolute as mere verbality can make them:—

"(1st.) She makes a verbally absolute statement of the regeneration of the child in the thanksgiving, 'We yield thee hearty thanks, most merciful Father, that it hath pleased thee to regenerate this infant with thy Holy Spirit,' &c.

"(2nd.) She makes an equally unconditional assertion as to the future salvation of the infant in the exhortation, 'Beloved, ye hear,' &c.: where we are told, 'not to doubt, but earnestly believe' that result to be certain [namely, 'that he will give unto him the blessing of eternal life, and make him partaker of His everlasting kingdom'].

"Nevertheless, in the concluding petition, ('We yield thee,' &c.), the Church makes that which had been the subject of positive declaration, again, the matter of humble prayer, and therefore only of conditional expectation:—['Humbly we beseech thee to grant, that .... finally, with the residue of thy holy Church, he may be an inheritor of thine everlasting kingdom']. Thus she clearly avows that, in this instance, her language of undoubting belief, and unhesitating assertion, is to be 'justly construed' as only conditional, hypothetical, charitable, and hopeful.

"It is not, therefore, inconsistent with her phraseology, or, rather, it is fully consonant with her intentions, to construe her verbally absolute declaration with regard to the regeneration of every infant, in the same hypothetical manner: and this construction, being the only one which will reconcile her Liturgy with her Articles, is that which, 'in common equity ought to be allowed,' and which in common sense must be adopted.

"The Church herself has given this intimation of the mode in which her language is to be construed, at the close of the Baptismal Services; where, exhorting both infants (through their sureties) and adults, she reminds them, that 'Baptism doth represent unto us our profession;' and that we who are baptized should die from sin, and rise again unto righteousness; although 'a death unto sin, and a new birth unto righteousness,' being the inward grace, (included in the terms 'regenerate,' and 'born again,') are effects declared verbally to have taken place in, and by, the Sacrament. An hypothetical meaning and conditional construction, is the only one which renders these parts of the Services consistent with each other, as well as conformable to the express teaching of the Church in her standard of doctrine.

"3. The same conclusion follows from that passage in the

Burial Service, in which, in absolute terms, we 'thank God that it hath pleased him to deliver this our brother out of the miseries of this sinful world;' although it is manifest that we cannot definitively pronounce on the future state of every individual, in successive generations, to whom that Service is to be applied; and although, in a subsequent part of that Service, the Church falls back into the simply charitable declaration, that 'our hope is that this our brother' rests in Christ.

"4. This construction becomes rivetted on these apparently absolute expressions, by the fact that, notwithstanding the declaration that baptized persons are 'born again,' the Church instructs us (in other Services) to pray for this very blessing in after life. The Collect for Christmas Day,[1] and that for the Circumcision,[2] are prayers to this effect: the language of each of those prayers, I consider as prospective,—that of the second is so beyond controversy.[3] The petition which concludes the first part of the Homily for Whit-Sunday is most distinct on this point, in that prayer, 'Let us give hearty thanks to God .... humbly beseeching Him so to work in our hearts by the power of His Holy Spirit, that we, being regenerate, and newly-born again in all goodness, righteousness, sobriety and truth, may in the end be made partakers of everlasting life.'[4]

[1] "Grant that we, being regenerate, and made thy children by adoption and grace, may daily be renewed by Thy Holy Spirit." Up to the year 1812, the *Society for Promoting Christian Knowledge* (in their Tract, "Directions for Decent Behaviour in the House of God,") stated this as—"Regeneration, a prayer for it."

[2] "Grant us the true circumcision of the Spirit; that our hearts and all our members, being mortified from all worldly and carnal lusts, we may, in all things, obey thy blessed will," &c.

[3] The Bishop here interposed, and said, that he denied the prospective reference of these words,—"being mortified." I stated, in reply, that it was impossible that these words could be retrospective, since no Christian, however advanced in grace, could say, that "his heart and all his members had been mortified from all carnal and worldly lusts." I cited, also, the expressions, "we being hurt by no persecutions," from the Litany; "being stedfast in faith, joyful through hope, and rooted in charity," from the Baptismal Service;—as instances that that phraseology was often used by the Church in a prospective sense. I was about to produce other examples, when his Lordship checked the discussion, and remarked that it was "matter of opinion," with regard to the Collect on the Circumcision.

[4] Here, again, the Bishop interposed, and denied that this was a prayer for regeneration.

Regeneration, therefore, in Baptism is affirmed absolutely in words, but conditionally in meaning; it may not have taken place, and is, therefore, to be implored in after years.

"5. In truth, not only many expressions in the Liturgical Services would be misinterpreted, but the language of Scripture itself might be (as it has been) awfully perverted, if the principle were not allowed that the most absolute terms must be construed sometimes in a symbolical, sometimes in a conditional sense, according to the manifest intention of the person who used them.

"(1.) What can be more absolute than our Lord's affirmation respecting the bread, 'This is my body!' Transubstantiation[1] follows from the exaction (contrary to common sense) of a literal acceptation of these words; as regeneration, by the opus operatum of Baptism, would follow from an exaction (contrary to the doctrine of the Articles) of an unjustly verbal construction of certain affirmations in the Baptismal Service.

"(2.) We find, in the Apostolic Epistles, absolute declarations respecting the sanctified state of every individual included in the Churches to whom they were written (see Romans i. 7: 1 Thess. i. 1, 2, 4[2]): though it is manifest that these affirmations must be understood as conditional and charitable assumptions.

"6. That such is the 'just construction' of the language of the Rituals, as cited in these three Questions, and as prevailing throughout the Baptismal Services, will appear, if we consider with what care those who compiled the Formularies of the Church discriminate between the Sacraments, or Signs, and the grace or thing signified; as perfectly distinct conceptions; as matters separable and often separated. I must illustrate this by both Sacraments; distinctions in kind being needless, and only perplexing the argument. The Catechism, logically and most correctly, defines a Sacrament to be a Sign

[1] The Bishop once more stopped my reading, to remark, that Transubstantiation did not necessarily follow; that he himself held these words ought to be interpreted literally, but did not hold transubstantiation.

[2] "To all that be in Rome, beloved of God, called to be saints." (Rom. i. 7.) "Paul, and Silvanus, and Timotheus, unto the Church of the Thessalonians .... we give thanks unto God always for you all ... knowing, brethren beloved, your election of God." (1 Thess. i. 1, 2, 4.)

of an inward and spiritual grace. Article XXIX. calls the mere outward element 'the Sacrament or Sign,' clearly distinguished from, and not even (in the case referred to) accompanied by, 'so great a thing' as the inward grace. In the Communion of the Sick, it is declared, that the faithful may spiritually 'eat and drink' the body and blood, though from physical weakness he do not receive 'the Sacrament,' the elemental Sign. The Homilies insist strongly on this distinction. 'St. Augustine' (says the Homily on Common Prayer) 'calleth Sacraments holy signs: and, writing of the Baptism of Infants, he saith, If Sacraments had not a certain similitude of those things whereof they be Sacraments, they should be no Sacraments at all: and of this Similitude they do for the most part receive the names of the selfsame things they signify.' And that Discourse, which was written specially on this subject, warns us to mark the important difference between 'the outward Sacrament, and the spiritual thing; the Figure, and the truth; the Shadow, and the body.' (Homily on the Sacrament of the Body, &c.) So Cranmer writes somewhere, 'In Sacraments, saith St. Austin, is to be considered, not what they be, but what they show; for they be Signs of other things, being one thing, and signifying another.'

"It is true that, by a metonymy, the Sign is often used for the thing signified; and this practice of the early fathers, sometimes adopted in the writings of our Reformers, and in one place in our Catechism (—I mean the description of a sacrament as to its 'parts,' whenever the Sign and the grace are happily united by the worthy recipient—), has led to confusion in the minds of those who do not carefully mark the distinction, and separability, of these two matters. But the meaning of the Church is clear, if a 'just and favourable construction be allowed' (and she herself claims it) for her expressions.

"III. The writings of our Reformers, candidly examined, throw light on the construction of the Church Services. These, of course, I cannot quote at large in an extempore Examination. Coverdale, Latimer, Ridley, Cranmer, Hooper, have marked the distinction, and the separability of the

Sacrament or Sign from the Grace or the Thing signified, in precise and unmistakeable language. Jewel, the great light of that era, who polished the stones, which the fathers of the Reformation hewed rough from the quarry,—who (as your Lordship has lately reminded us, your clergy) was 'the most prominent of the Bishops,' of that age, has stated this matter with beautiful accuracy; when he gives his judgment that 'in Baptism, as the one part of that holy mystery, is Christ's blood, so is the other part the material water: neither are these parts joined together in place, but in mystery; and therefore they be oftentimes severed, and the one is received without the other.'

"Neither Jewel, nor any other Expositor, is my standard. I base my doctrines on the Thirty-nine Articles; but the above citation from this eminent Bishop, so well qualified to give his judgment, expresses generally my view of the Sacrament of Baptism."

The answers to Questions XVIII. and XIX. are also material.

"Q. XVIII.—Has the Church not declared her mind, that infants baptized by a lawful minister, in the name of the Father, and of the Son, and of the Holy Ghost, do receive the spiritual grace of Baptism; even if they have not entered into the stipulations by their representatives?

"A.—The Church has declared, that, to infants privately baptized, the grace and mercy of Christ is not denied;—in this case of emergency, I consider that stipulations, though not formally made by sponsors, are made by implication through those who earnestly desire their Baptism, and by the person who administers it; which implied stipulations the Church requires to be formally adopted as soon as the circumstances will suffer it. This case of 'present exigence' cannot, therefore, be fairly urged as an exception to the requirements of the Church.

"In the Catechism, the Church puts the Question, 'Why, then, are infants baptized, when by reason of their tender age they cannot perform them' (the 'promises' made by their sureties)?—without limitation to infants baptized under any

particular circumstances. It is a Question stating a difficulty in its broadest and most general character.

"Now the Answer which the Church gives, brings us, of necessity, to one of three conclusions:—

"Either, 1st, the Church intended unworthily to evade the principal difficulty; namely, the case of infants baptized in emergency, without the formal stipulations, the execution of which is declared in the Answer, to solve the difficulty proposed.

"Or, 2dly, she intended to impose a charitable silence on her members, with regard to so nice and curious a point, shutting up all further search in the promises of God, as generally set forth in Holy Scripture.

"Or, 3dly, she intended to embrace that case, in her general Answer, and to consider that the stipulations were implied, under these urgent circumstances, (to be hereafter absolutely entered into if more favourable circumstances permitted,) though they were not formally given.

"The 1st of these suppositions, of course, I dismiss peremptorily.

"The 2d hypothesis would put an end to all further inquiry into the subject.

"The 3d conclusion, therefore, which I adopt, is the only solution which is possible, if I am required to declare my view of the meaning of the Church.

"Q. XIX.—Does the Church hold, and do you hold, that infants, so baptized, are regenerated, independently of the stipulations made by their representatives, or by any others for them?

"A.—If such infants die before they commit 'actual sin,' the Church holds, and I hold, that they are 'undoubtedly saved;' and therefore they must have been regenerated by an act of grace prevenient to their Baptism, in order to make them worthy recipients of that Sacrament. The case is ruled[1] by the Church.

"But, if the infant lives to a period in which it can commit 'actual sin,' the declaration of regeneration must be construed

[1] "I mean,—it is ruled that they were actually regenerated, and that they are 'undoubtedly saved.'"

according to the hypothetical principle which I have stated in my Replies to Questions V. VI. VII.

"That part of the Question which relates to sponsorship, in these cases, I have replied to in the Answer to Question XVIII. so far as the mind of the Church can be ascertained."

From these extracts the reader will probably gain as clear an insight into Mr. Gorham's opinions on Baptism as could be obtained by a perusal of the whole Examination.

On the day following the conclusion of the Examination, March 11, 1848, Mr. Gorham was informed by the Bishop's chaplain, that he felt bound to decline instituting him, on the ground of the unsoundness of the doctrines stated by him in the Examination. Mr. Gorham thereupon resolved to compel the Bishop, by legal proceedings, to grant him institution.

The form of proceeding adopted was that of Duplex Querela, a remedy in the nature of a complaint to the Archbishop of the Province against the Ordinary for some alleged denial of justice. It is a form, of which the very title has been differently interpreted by learned writers,[1] and which, though it must once have been common, as appears from the fact of a canon having been passed in 1603, "For the restraint of Double Quarrels," had become so obsolete that it was with difficulty that a precedent for the form of pleading in such cases was discovered in one of the Proctors' Offices.[2] In accordance with this, a monition was duly issued from the registry of the Court, whereby the Dean of the Arches (Sir H. J. Fust) called upon the Bishop of Exeter to institute Mr. Gorham, or to show cause why he should not do so within fifteen days,—failing which, the Dean of the Arches would proceed to institute Mr. Gorham.

The Bishop's reply is contained in the "Act on Petition." This document states that, on Mr. Gorham's presentation, the Bishop proceeded, as he was bound, to examine him, in order to ascertain his fitness; and adds: "That, it appeared to the Bishop, in the course of his examination, that Mr. Gorham

[1] Burn's Ecclesiastical Law. "Double Quarrel."

[2] The course of procedure and mode of trial, however, are described in Burn's Ecclesiastical Law. "Benefice."

was of unsound doctrine respecting that great and fundamental point, the efficacy of the Sacrament of Baptism,—inasmuch as he held and persisted in holding that spiritual regeneration is not given or conferred in that Holy Sacrament; in particular, that infants are not made therein members of Christ and the children of God, contrary to the plain teaching of the Church of England, in her Articles and Liturgy, and especially contrary to the divers Offices of Baptism, the Office of Confirmation, and the Catechism, severally contained in the Book of Common Prayer and Administration of the Sacraments, and other rites and ceremonies of the Church, according to the use of the United Church of England and Ireland." The Act on Petition further states, that Mr. Gorham has published an account of the examination, and, in part supply of proof, it refers to this book, which is brought into the Registry.

Mr. Gorham's answer stated that the book brought into the Registry contained a full, true, and accurate account of all that passed between the Bishop and himself; but it denied that he maintained unsound doctrine "respecting the efficacy of the Sacrament of Baptism, or that he has held, or persisted in holding any opinions thereon at variance with the plain teaching of the Church of England in her Articles and Liturgy: it further explicitly and expressly denied, that Mr. Gorham held that infants are not made in Baptism members of Christ and the children of God: it alleged that Mr. Gorham did not maintain any views whatsoever contrary to the true doctrine of the Church of England, as dogmatically determined in her Articles, familiarly taught in her Catechism, and devotionally expressed in her Services, it having been his desire and endeavour, throughout his examination, to explain the language both of her Articles and Liturgy (in compliance with the express directions of the Church herself) by such 'just and favourable construction' as would secure an entire agreement not only of each with the others, but of all alike with the plain tenor of Holy Scripture, declared by the Articles to be of paramount and absolute authority." After a rejoinder from the Bishop, and an affidavit from Mr. Gorham, verifying the statements contained in his answer, the matter came into Court.

A preliminary question was argued as to the right of the Bishop to examine Mr. Gorham, the examination not having begun within twenty-eight days after the presentation was tendered, according to the direction of Canon 95, for "The Restraint of Double Quarrels," which declares, "For the avoiding of some inconveniences, we do now abridge the said two months (viz. 'the space given to a Bishop to inquire and inform himself of the sufficiency and qualities of any minister, after he hath been presented unto him to be instituted into any benefice') unto eight-and-twenty days only." The Dean of the Arches,[1] by a judgment, bearing date February 17th, 1849, overruled the objection, and assigned to hear informations on the principal cause immediately.

On February 17th, the case came before the Court on the merits, and was fully argued. No attempt was made[2] before the trial to specify the passages in Mr. Gorham's book which were held to be unsound, nor the passages in the formularies of the Church which he was alleged to have contradicted. This appears to have been due, in part, to a formal reason, viz. that each party considered the onus of proof to lie with the other; partly to the guarded manner in which Mr. Gorham's opinions, for the most part, were expressed, and to the fact that his views on the formularies were given in a general manner, not in the shape of precise dogmatic replies to the pointed questions addressed to him by the Bishop.

The Court appears to have considered that the burden of proof lay with the Bishop, and that he ought to have stated, first, what passages in the formularies Mr. Gorham had contravened; secondly, what precise doctrine he understood those passages to affirm; thirdly, what statements in Mr. Gorham's examination he considered unsound.

The Judgment of the Dean of Arches was given on August 2d, 1849. After recapitulating the circumstances which led to the suit, the Judge showed that the issue was narrowed to the question of the efficacy of Infant Baptism. He declared the Articles to be *primâ facie* the standard of doctrine; but held that if the Articles be silent on a controverted point, the other

[1] Sir H. J. Fust.

[2] See the notice taken of this by the Judicial Committee.

formularies of the Church must be consulted. Now Mr. Gorham's doctrine (the Judge argued) goes beyond the Articles, inasmuch as he *defines* worthy reception of Baptism, declaring that it depends on faith and repentance, the germ of which must be supposed to exist even in infants at the time of baptism; and whereas all infants are born in sin, they can only be worthy recipients, in most cases, by virtue of some prevenient act of grace. The Articles declare that baptism is of use only to those who receive it worthily; but they do not state in what worthy reception consists. Now Mr. Gorham, in explaining the doctrine (which he admits) that baptized infants who die before the commission of sin are undoubtedly saved, declares that they must already, before baptism, have received grace. "It is sufficient for the Court to observe that Mr. Gorham's position is, that it is not by baptism or through baptism that grace is conferred." But the formularies (of which the Judge made a lengthened examination) declare that a child "is by baptism regenerate," and this even in the case of private baptism, where there are no sponsors to pledge for the child that faith and repentance, which alone, in Mr. Gorham's view, constitute worthy reception. As this declaration is unconditional in the Service for private baptism, it must be taken as unconditional in the Service for public baptism. And the "charitable hope" which may be introduced as a sufficient explanation of the expressions in the Service for adult baptism (which was added long after) must not be taken as a sufficient explanation of the Service for infant baptism. The same doctrine is to be found in the other formularies. Grace, then, is given to infants unconditionally, and the mode of receiving the blessing is not prevenient grace, but baptism. The Judge observed that the question, in great part, turned upon the meaning assigned to the word Regeneration. "It seems to me," he said, "that the word regeneration does not mean and imply such a total change of character as to preclude persons baptized from ever or finally falling away, but that the word means such a change of station, character, and relation, as places them in a new situation, from children of wrath to children of grace." The former meaning was given to regeneration by Calvin, and

it is supposed that the Reformers followed Calvin in this But the history of the formularies proves that, though strong Calvinistic views were held by Whitgift and others, in the reign of Elizabeth, the earlier Reformers differed from Calvin; and it cannot be shown that they considered grace once given to be indefectible. The idea, therefore, that the Reformers were Calvinists cannot give to the formularies a different sense to that which lies on the face of them, viz. that all baptized infants are brought into a state of grace, from which many afterwards fall.

Nor can the private opinions of divines make any difference. "I am of opinion that to the private views of individuals however eminent, I am not at liberty to attend. Their opinions can have no binding effect upon my judgment. So long as the Articles and the Services of the Church are reconcileable, and not only reconcileable, but necessarily consistent, I must construe them together. If a doctrine is laid down in the baptismal and other services, and in the Rubrics, all of which were confirmed by Act of Parliament and adopted by Convocation, I must look to that source for my guide, if the Articles are silent on the point, and not indulge in fancy, explaining it by the opinions expressed by private individuals."

The Judge concluded as follows:—"Therefore I say, that as the doctrine of the Church of England undoubtedly is, that children baptized are regenerated at Baptism, and are undoubtedly saved if they die without committing actual sin, Mr. Gorham has maintained and does maintain opinions opposed to that Church of which he professes himself a member and minister."

The case was heard on Appeal (Dec. 11th, 1864), before the Judicial Committee.

The Counsel for Mr. Gorham (Mr. Turner and Dr. Bayford) dwelt upon the following points:—

The Articles are the Code of Doctrine in the Church of England, the Prayer-book the Code of Devotion. It is not imputed to Mr. Gorham that he holds anything inconsistent with the Articles, but that he holds doctrine inconsistent with opinions gathered by the Bishop of Exeter inferentially from

the services of the Church. Mr. Gorham, indeed, has never been furnished with a distinct statement of the doctrine which he is alleged to contradict. It may be stated, however, as that of unconditional regeneration in baptism. This opinion is the same as the "opus operatum" of the Council of Trent, which the Twenty-fifth Article condemns, as is shown by the version of that Article in the edition of 1552,[1] where the words are used: "And in such only as worthily receive the same have they a wholesome effect or operation, not, as some say, *Ex opere operato*." The present Article, though leaving out the particular words *Ex opere operato*, as effectually by its meaning condemns the idea of unconditional grace.

But the question is not whether the doctrine of Mr. Gorham is laid down in the Articles, but whether it is tenable consistently with them. The policy of the Church of England is inclusive, not exclusive, as is seen by the accounts in Heylin (1, 153, 228,) and Burnet (II. 347) of the formation of the Liturgy and Articles. Many questions were intentionally left open, as appears from the Declaration appended to the Articles, where members of the Church are bidden to lay aside curious questionings, and to accept the Articles in their plain, literal meaning. If an opinion on matters not ruled by the Articles may be imposed as a test of doctrine, each diocese will have a standard of its own. The fact that Mr. Gorham's opinion is one on which liberty has been left by the Church, is proved by similar liberty having been allowed by writers like Burnet, and exercised by many received divines, such as Bishops Davenant and Barlow, Downame and Usher. The opinions of Peter Martyr and Bucer, who were placed by Cranmer in the Theological Professorships, were similar to Mr. Gorham's; and similar views are also expressed in Bullinger's "Decades," which were ordered by Archbishop Whitgift and the Convocation of 1586, and by a State Paper of Queen Elizabeth in 1587, to be read as a text-book by the Clergy.

A true review of the baptismal services shows that they all admit of explanation on that charitable hypothesis which is confessedly the true explanation in the service for adult baptism, and that Mr. Gorham's assertion of prevenient

[1] It is the 26th of the Articles of 1552.

grace in the case of infants dying after baptism is an admissible explanation of the statement, that it is certain by God's Word that they are undoubtedly saved.

The Counsel on the other side (Dr. Addams and Mr. Badeley) began by justifying the course pursued by the Bishop of Exeter, 1st, as to the Examination, the length of which was due to Mr. Gorham's not giving direct answers; 2d, as to the grounds of refusing to institute, there being many reasons which were good grounds for not instituting though not for deprivation, such as being "minus sufficiens in literaturâ." As to the doctrinal question, the Bishop held that the Church taught that all the benefits of baptism were given to infants indiscriminately, they being fit recipients because of their innocency. This Mr. Gorham impugned. It was absurd to suppose that the Church could hold two inconsistent systems of doctrine. Were she to do so, she would cease to be a witness for the truth.

The argument from the Formularies might be put in this form:—1st. The declarations of the Church were binding and conclusive. 2d. Those declarations were to be found in the Articles and Liturgy equally, for they were of co-ordinate authority; "lex orandi est lex credendi." 3d. The Articles, if taken as a whole, did teach absolute Baptismal Regeneration. The present doctrine was the same as that of 1543, and the condemnation of the "opus operatum," though said in a general way of the Sacraments, was limited, like the declaration as to the Sacraments being carried about, to certain parts of the subject. The mention of the Baptism of Infants, though short, was conclusive as to their fitness to receive it. 4th. Where the Articles were doubtful, the words of the services must be taken in their absolute sense. There could be no doubt that the services spoke absolutely of infants as regenerate. Up to the moment of baptism the child was unregenerate. The moment after baptism it was regenerate. As to the "charitable" hypothesis, had the services meant to convey that idea, they would have done so distinctly. The proof that they did not, was, that in 1660, 2,000 Puritans left the Church sooner than understand the formularies in that unnatural way. The testimony of the Fathers (into which

Mr. Badeley entered at great length) was invariable; and if there was any doubt about our formularies, to the Fathers the Appeal must lie.

Mr. Turner, in his reply, restated the main points of his argument which, he contended, had not been touched by his opponents; he maintained that Mr. Gorham's doctrine adequately represented that of the Church, even the expression "prevenient grace" being the equivalent of other liturgical expressions; that it had been designed at the Reformation to make the change for which Mr. Gorham contended; that the Articles were the Code of Faith, the Prayer-book that of Devotion. He added that, in 1660, the "charitable" construction of the formularies was held allowable by the Bishops, and that the Fathers were not uniform in their language, many of them being against an absolute regeneration in Baptism.

On the 8th of March, 1850, the Judgment of the Judicial Committee was read in the Council Chamber by Lord Langdale, as follows:—

"This is an appeal by the Reverend George Cornelius Gorham, against the Sentence of the Dean of the Arches Court of Canterbury, in a proceeding called a Duplex Querela, in which the Right Reverend the Lord Bishop of Exeter, at the instance of Mr. Gorham, was called upon to show cause why he had refused to institute Mr. Gorham to the Vicarage of Brampford Speke.

"The Judge pronounced that the Bishop had shown sufficient cause for his refusal, and thereupon dismissed him from all further observance of justice in the premises, and, moreover, condemned Mr. Gorham in costs.

"From this sentence Mr. Gorham appealed to Her Majesty in Council. The case was referred by Her Majesty to this Committee. It has been fully heard before us; and by the direction of Her Majesty, the hearing was attended by my Lords, the Archbishops of Canterbury and York and the Bishop of London, who are Members of Her Majesty's Privy Council. We have the satisfaction of being authorized to state that the Most Reverend Prelates the Archbishops of Canterbury and York, after perusing copies of our judgment,

have expressed their approbation thereof. The Right Reverend the Lord Bishop of London does not concur therein.[1]

"The facts, so far as it is necessary to state them, are as follows:—

"Mr. Gorham, being Vicar of St. Just, in Penrith, in the Diocese of Exeter, on the 2d November, 1847, was presented by Her Majesty to the Vicarage of Brampford Speke, in the same Diocese, and soon afterwards applied to the Lord Bishop of Exeter for admission and institution to the Vicarage.

"The Bishop, on the 13th of November, caused Mr. Gorham to be informed that his Lordship felt it his duty to ascertain, by examination, whether Mr. Gorham was sound in doctrine, before he should be instituted to the Vicarage of Brampford Speke.

"The examination commenced on the 17th of December, and was continued at very great length for five days in the same month of December, and (after some suspension) for three more days in the following month of March.

"The questions proposed by the Bishop related principally to the Sacrament of Baptism, and were very numerous, much varied in form, embracing many points of difficulty; and often referring to the answers given to previous questions.

"Mr. Gorham did not at first object to the nature of the examination; but, during its progress, he at various times remonstrated against the manner in which it was conducted, and the length to which it extended. We are, however, relieved from the necessity of considering whether he could, or could not, lawfully have declined to submit to such a course of examination; because he did in fact answer nearly all the questions, and no complaint is made of his not having answered them all.

"The examination being concluded, the Bishop refused to institute Mr. Gorham, for the reason (as stated in the notification) that 'he had upon examination found Mr. Gorham unfit to fill the Vicarage, by reason of his holding doctrines contrary

[1] This appears to be the first occasion on which differences of opinion among the Privy Councillors present were stated. See the notice of Vice-Chancellor Knight Bruce's dissent at the end of the Judgment (p. 105). See also Introduction, p. lxxiv.

to the true Christian faith, and the doctrines contained in the Articles and Formularies of the United Church of England and Ireland, and especially in the Book of Common Prayer, and Administration of the Sacraments, and other rites and ceremonies of the Church, according to the use of the United Church of England and Ireland.'

"Mr. Gorham, being refused institution, commenced proceedings in the Arches Court of Canterbury; and at his promotion a monition with intimation issued on the 15th of June, 1848, and thereby the Bishop was monished to admit Mr. Gorham to the Vicarage, and to institute and invest him therein; or otherwise, to appear and show cause why Mr. Gorham should not be admitted and instituted by the Official Principal of the Arches Court of Canturbury.

"After litigation had thus commenced, and Mr. Gorham had called upon the Bishop to state why institution was refused, it became evident that the reasons must be considered upon legal principles, and it was perhaps reasonably to be expected that both parties would require a strict and formal proceeding, in which what was the particular unsound doctrine imputed to Mr. Gorham would have been distinctly alleged which constituted his alleged offence.

"Unfortunately this course was not adopted. The Bishop proceeded by Act on Petition; and in his Act he stated his charge against Mr. Gorham, and alleged, 'that it appeared, to him, in the course of the examination, that Mr. Gorham was of unsound doctrine respecting that great and fundamental point of Baptism, inasmuch as Mr. Gorham held, and persisted in holding, that spiritual regeneration is not given or conferred in that Holy Sacrament,—in particular, that infants are not made members of Christ, and the children of God,—contrary to the plain teaching of the Church of England, in her Articles and Liturgy; and especially contrary to the divers offices of Baptism, the office of Confirmation, and the Catechism, severally contained in the Book of Common Prayer, and administration of the Sacraments, and other rites and ceremonies of the Church, according to the use of the United Church of England and Ireland.'

"In part supply of proof of the premises, the Bishop

referred to a book written and caused to be printed and published by Mr. Gorham, containing, amongst other things, the several questions put by the Bishop to Mr. Gorham in the course of the examination, and Mr. Gorham's several answers to the same questions.

"Mr. Gorham made no objection to the mode of proceeding by Act on Petition, but put in his answer thereto; and thereby after alleging that the book published by him, and brought into Court by the Bishop, 'contained a full, true, and accurate account of all the questions and answers which were given in the course of the examination,' he distinctly and emphatically denied that he in his examination did maintain, or had at any time maintained, unsound doctrine respecting the efficacy of the Sacrament of Baptism,—or that he had held, or persisted in holding, any opinions thereon at variance with the plain teaching of the Church of England, in her Articles and Liturgy; and further explicitly and expressly denied, that he either held or persisted in holding, that infants are not made in Baptism members of Christ, and the children of God; and he alleged that he did not maintain any views whatever contrary to the true doctrine of the Church of England, as dogmatically determined in her Articles, familiarly taught in her Catechism, and devotionally expressed in her Services,—it having been his desire and endeavour throughout the examination to explain the language both of her direct Articles and Liturgy (in compliance with the expressions of the Church herself) by such just and favourable construction as would secure an entire agreement, not only of each with the other, but of all alike, with the plain tenor of Holy Scripture, declared by the said Articles to be of paramount and absolute authority. The Bishop replied to Mr. Gorham's answers generally. The book published by Mr. Gorham was the only evidence adduced on either side; and with such allegations as are contained in the Bishop's Act on Petition, and Mr. Gorham's Answer, the case was brought on to be heard, with no statement on the part of the Bishop of what was in his Lordship's view the true doctrine of the Church of England, in respect of the efficacy of the Baptism either of adults or infants; nor any specification of the doctrine imputed to

Mr. Gorham, except the general charge before stated; and no distinct statement on the part of Mr. Gorham of what in his view is the true doctrine of the Church of England,—what is the particular doctrine which he himself maintains on the subject in question,—or in what particulars, or for what particular expressions, he requires the just and favourable construction, which he considers to be necessary and sufficient to secure the entire agreement between the Articles and the Liturgy and his doctrine. As this form of pleading was acquiesced in on both sides, neither party has any reason to complain of the other; but those who are called upon to judge of the matters in difference have great reason to complain that, instead of their attention being directed, as it ought to have been, to specific propositions distinctly stated, and to the evidence directly applicable to those propositions, instead of having a specific and precise statement of that which the Bishop alleged to be the doctrine of the Church of England upon the matters in question, and upon which he meant to rely, and of the specific doctrine held by or imputed to Mr. Gorham, and alleged to be unsound,—the case is brought forward and left in such a form, that without being supplied with any allegations distinctly stated, or any issue distinctly joined, we are required minutely and accurately to examine a long series of questions and answers—questions upon a subject of a very abstruse nature, intricate, perplexing, entangling, and many of them not admitting of distinct and explicit answers; and answers not given plainly and directly, but in a guarded and cautious manner, with the apparent view of escaping from some apprehended consequence of plain and direct answers.

"The inconvenience of this course of proceeding is so great, and the difficulty of coming to a right conclusion is thereby so unnecessarily increased, that, in our opinion, the Judge below would have been well justified in refusing to pronounce any opinion upon the case as appearing upon such pleadings; and in requiring the parties, even at the last moment, to bring forth the case in a regular manner by plea and proof.[1]

[1] The demand for plea and proof was enforced in the case of Burder *v.* Heath in two successive Judgments. See pp. 214, 222.

"The case comes before us in precisely the same state; and although the Counsel on both sides have used their best endeavours to remove the vagueness and uncertainty found in the pleadings, as well as in the examination, and have thereby much assisted us, they have not been able entirely to remove the difficulty.

"In considering the examination, which is the only evidence, we must have regard not only to the particular question to which each answer is subjoined, but to the general scope, object, and character of the whole examination; and if, under circumstances so peculiar and perplexing, some of the answers should be found difficult to be reconciled with one another (as we think is the case), justice requires that an endeavour should be made to reconcile them in such a manner as to obtain the result which appears most consistent with the general intention of Mr. Gorham in the exposition of his doctrine and opinions.

"Adopting this course, the doctrine held by Mr. Gorham appears to be this,—that Baptism is a Sacrament generally necessary to salvation, but that the grace of regeneration does not so necessarily accompany the act of Baptism, that regeneration invariably takes place in Baptism; that the grace may be granted before, in, or after Baptism; that Baptism is an effectual sign of grace, by which God works invisibly in us, but only in such as worthily receive it—in them alone it has a wholesome effect; and that, without reference to the qualification of the recipient, it is not in itself an effectual sign of grace. That infants baptized, and dying before actual sin, are certainly saved; but that in no case is regeneration in Baptism unconditional.

"These being, as we collect them, the opinions of Mr. Gorham, the question which we have to decide is, not whether they are theologically sound or unsound—not whether upon some of the doctrines comprised in the opinions, other opinions opposite to them may or may not be held with equal or even greater reason by other learned and pious ministers of the Church; but whether these opinions now under our consideration are contrary or repugnant to the doctrines which the Church of England, by its Articles, Formularies, and

Rubrics, requires to be held by its ministers, so that upon the ground of those opinions the Appellant can lawfully be excluded from the benefice to which he has been presented.

"This question must be decided by the Articles and the Liturgy; and we must apply to the construction of those books the same rules which have been long established, and are by law applicable to the construction of all written instruments. We must endeavour to attain for ourselves the true meaning of the language employed, assisted only by the consideration of such external or historical facts as we may find necessary to enable us to understand the subject-matter to which the instruments relate, and the meaning of the words employed.

"In our endeavour to ascertain the true meaning and effect of the Articles, Formularies, and Rubrics, we must by no means intentionally swerve from the old established rules of construction, or depart from the principles which have received the sanction and approbation of the most learned persons in times past, as being on the whole the best calculated to determine the true meaning of the documents to be examined. If these principles were not adhered to, all the rights, both spiritual and temporal, of Her Majesty's subjects would be endangered.

"As the subject-matter is doctrine, and its application to a particular question, it is material to observe that there were different doctrines or opinions prevailing or under discussion at the times when the Articles and Liturgy were framed, and ultimately made part of the law: but we are not to be in any way influenced by the particular opinions of the eminent men who propounded or discussed them; or by the authorities by which they may be supposed to have been influenced; or by any supposed tendency to give preponderance to Calvinistic or Arminian doctrines. The Articles and Liturgy as we now have them must be considered as the final result of the discussion which took place;—not the representation of the opinions of any particular men, Calvinistic, Arminian, or any other; but the conclusion which we must presume to have been deduced from a due consideration of all the circumstances of the case, including both the sources from which the declared

doctrine was derived, and the erroneous opinions which were to be corrected.

"It appears from the resolutions and discussions of the Church itself, and from the history of the time, that from the first dawn of the Reformation, until the final settlement of the Articles and Formularies, the Church was harassed by a great variety of opinions respecting Baptism, and its efficacy, as well as upon other matters of doctrine.

"The Church, having resolved to frame Articles of faith, as a means of avoiding diversities of opinion, and establishing consent touching true religion, must be presumed to have desired to accomplish that object as far as it could, and to have decided such of the questions then under discussion as it was thought proper, prudent, and practicable to decide. But it could not have intended to attempt the determination of all the questions which had arisen or might arise, or to include in the Articles an authoritative statement of all Christian doctrine; and in making the necessary selection of those points which it was intended to decide, we may be allowed to presume that regard was had to the points deemed most important to be made known to, and to be accepted by, the members of the Church, and to those questions, upon which the members of the Church could agree, and that other points and other questions were left for future decision by competent authority, and, in the meantime, to the private judgment of pious and conscientious persons.

"Under such circumstances, it would perhaps have been impossible, even if it had been thought desirable, to employ language which did not admit of some latitude of interpretation. If the latitude were confined within such limits as might be allowed without danger to any doctrine necessary to salvation, the possible or probable difference of interpretation may have been designedly intended, even by the framers of the Articles themselves; and in all cases in which the Articles considered as a test admit of different interpretations, it must be held that any sense of which the words fairly admit may be allowed, if that sense be not contradictory to something which the Church has elsewhere allowed or required; and in such a case, it seems perfectly right to con-

clude that those who imposed the test, command no more than the form of the words employed in their literal and grammatical sense conveys or implies; and that those who agree to them are entitled to such latitude or diversity of interpretation as the same form admits.

"If it were supposed that all points of doctrine were decided by the Church of England, the law could not consider any point as left doubtful. The application of the law, or the doctrine of the Church of England, to any theological questions which arose, must be the subject of decision; and the decision would be governed by the construction of the terms in which the doctrine of the Church is expressed, viz. the construction which on the whole would seem most likely to be right.

"But if the case be, as undoubtedly it is, that in the Church of England many points of theological doctrine have not been decided, then the first and great question which arises in such cases as the present is, whether the disputed point is or was meant to be settled at all, or whether it is left open for each member of the Church to decide for himself according to his own conscientious opinion. If there be any doctrine on which the Articles are silent or ambiguously expressed, so as to be capable of two meanings, we must suppose that it was intended to leave that doctrine to private judgment, unless the Rubrics and Formularies clearly and distinctly decide it. If they do, we must conclude that the doctrine so decided is the doctrine of the Church. But, on the other hand, if the expressions used in the Rubric and Formularies are ambiguous, it is not to be concluded that the Church meant to establish indirectly as a doctrine that which it did not establish directly as such by the Articles of faith—the code avowedly made for the avoiding of diversities of opinion, and for the establishing of consent touching true religion.

"We must proceed, therefore, with the freedom which the administration of the law requires, to examine the Articles and the Prayer Book for the purpose of discovering what it is, if anything, which, by the law of England, or the doctrine of the Church of England as by law established, is declared as to the matter now in question, and to ascertain whether

the doctrine held by Mr. Gorham, as we understand it to be disclosed in his examination, is directly contrary or repugnant to the doctrine of the Church.

"Considering, first, the effect of the Articles alone, it is material to observe, that very different opinions as to the Sacrament of Baptism were held by different promoters of the Reformation; and that great alterations were made in the Articles themselves upon that subject.

"The Articles about religion, drawn up in 1536, state it is offered unto all men, as well infants as such as have the use of reason; that by Baptism they shall have remission of sin, and the grace and favour of God; that the promise of grace and everlasting life (which promise is adjoined to the Sacrament of Baptism) pertaineth not only to such as have the gift of reason, but also to infants, innocents, and children; and that they ought, therefore, and must needs be baptized;—and that by the Sacrament of Baptism they do also obtain remission of their sin, the grace and favour of God, and be made thereby the very sons and children of God. Insomuch as infants and children dying in their infancy shall undoubtedly be saved thereby, and else not. That infants must needs be christened, because they be born in original sin, which sin must needs be remitted, which cannot be done but by the Sacrament of Baptism, whereby they receive the Holy Ghost, which executes his grace and efficacy in them, and cleanseth and purifieth them from sin by his secret virtue and operation; and that men or children, having the use of reason, and willing and desiring to be baptized, shall by virtue of that Holy Sacrament obtain the grace and remission of all their sins, if they shall come thereto perfectly and truly repentant, and contrite of all their sins before committed, and also perfectly and constantly confessing and believing all the articles of our faith; and, finally, if they shall also have firm credence and trust in the promise of God adjoined to the Sacrament,—that is to say, that in and by this said Sacrament which they shall receive, God the Father giveth unto them, for his Son Jesus Christ's sake, remission of all their sins, and the grace of the Holy Ghost, whereby they be newly regenerated, and made the very children of God, &c.

"In the book entitled 'A necessary Doctrine for any Christian Man,' and called 'The King's Book,' which was published in 1543, it is thus stated—'Because all men be born sinners,' 'and cannot be saved without remission of their sins, which is given in Baptism by the working of the Holy Ghost, therefore the Sacrament of Baptism is necessary for the attaining of salvation and everlasting life.' 'For which causes also it is offered, and pertaineth to all men, not only such as have the use of reason, in whom the same duly received taketh away and purgeth all kind of sins, both original and actual, committed and done before their Baptism: but also it appertaineth, and is offered unto infants, which, because they be born in original sin, have need and ought to be christened, whereby they, being offered in the faith of the Church, receive forgiveness of their sins, and such grace of the Holy Ghost that, if they die in the state of their infancy, they shall undoubtedly be saved.' 'Because as well this Sacrament of Baptism, as all other Sacraments instituted by Christ, have all their virtue, efficacy, and strength by the Word of God, which by His Holy Spirit worketh all the graces and virtues which be given by the Sacraments, to all those that worthily receive the same,' &c.

"The Articles of 1552, and 1562, adopt very different language from the Articles of 1536, and have special regard to the qualification of worthy and right reception.

"The twenty-fifth Article of 1562, distinctly states, that in such only as worthily receive the same, the Sacraments have a wholesome effect or operation. The Article on Baptism, in describing the blessings conferred by it, speaks only of those who receive it rightly; and with respect to infants, instead of saying, in the language of the Articles of 1536, that 'they obtain remission of their sins, and the grace and favour of God by Baptism,—and that dying in their infancy, they shall be undoubtedly saved thereby or else not,' it declares only, 'that Baptism of young children is in anywise to be retained in the Church, as most agreeable with the institution of Christ,' stating nothing distinctly as to the state of such infants, whether baptized or not.

"The Articles of 1536 have expressly determined two

points. 1. That baptized infants dying before the commission of actual sin were undoubtedly saved thereby. 2. That unbaptized infants were not saved:

"The Articles of 1562 say nothing expressly upon either point; but, not distinguishing the case of infants from that of adults, state in general terms that those who receive Baptism rightly have the benefits there mentioned conferred.

"What is signified by right reception is not determined by the Articles. Mr. Gorham says, that the expression always means or implies a fit state to receive,—viz. in the case of adults 'with faith and repentance,' and in the case of infants 'with God's grace and favour.'

"On a consideration of the Articles, it appears that, besides this particular point, there are others which are left undecided. It is not particularly declared what is the distinct meaning and effect of the grace of regeneration[1]—whether it is a change of nature, a change of condition, or a change of the relation subsisting between sinful man and his Creator; and there are other points which may very plainly be open to different considerations in different cases.

"Upon the points, which were left open, differences of opinion could not be avoided, even amongst those who sincerely subscribed to the Articles; and that such differences amongst such persons were thought consistent with subscription to the Articles, and were not contemplated with disapprobation, appears from a passage in the Royal Declaration, now prefixed to the Articles, and which was first added in the reign of King Charles I. long after the Articles were finally settled. 'Though some differences have been ill raised, yet we take comfort in this, that all clergymen within our realm have always most willingly subscribed to the Articles established; which is an argument to us, that they all agree in the true usual literal meaning of the said Articles, and that, even in those curious points in which the present differences lie, men of all sorts take the Articles of the Church of England to be for them; which is an argument again, that none of them intend any desertion of the Articles established.'

[1] See the allusion to this point in the account of Sir H. J. Fust's Judgment, p. 80.

"If the Articles which constitute the Code of Faith,[1] and from which any differences are prohibited, nevertheless contain expressions which unavoidably admit of different constructions,—and members of the Church are left at liberty to draw from the Articles different inferences in matters of faith not expressly decided, and upon such points to exercise their private judgments,—we may reasonably expect to find such differences of opinion allowable in the interpretation of the devotional services, which were framed not for the purpose of determining points of faith, but of establishing (to use the expression of the Statute of Elizabeth) an uniform order of Common Prayer, and of the Administration of Sacraments, Rites, and Ceremonies of the Church of England.

"In considering the Book of Common Prayer, it must be observed, that there are parts of it which are strictly dogmatical, declaring what is to be believed or not doubted; parts which are instructional, and parts which consist of devotional exercises and services. Those parts which are in their nature dogmatical, must be considered as declaratory of doctrine; but as to those parts which are devotional, consisting of prayers framed for the purpose of being 'more earnest, and fit to stir Christian people to the due honouring of Almighty God,' some further consideration is necessary.

"It seems to be properly said[2] that devotional exercises cannot be evidence of faith or of doctrine, without reference to the distinct declarations of doctrine in the Articles, and to the faith, hope, and charity by which the Formularies profess to be inspired or accompanied; and there are portions of the Liturgy which it is plain cannot be construed truly without regard to these considerations. For the proof of this, the instance which seems to be most usually cited, and which is conclusive, is the Service for the Burial of the Dead. So far as our knowledge or powers of conception extend, there are, and must be, at least some persons not excommunicated from the Church, who, having lived lives of sin, die impenitent,—nay, some who die and perish in the actual commission of

[1] The expression was constantly employed by Mr. Turner, who contrasted the Articles as the Code of Faith, with the Liturgy as the Code of Devotion.

[2] This is maintained by Mr. Gorham in his Examination.

flagrant crimes; yet in every case, in the Burial Service, as the earth is cast upon the dead body, the Priest is directed to say, and he does say—'Forasmuch as it hath pleased Almighty God, of His great mercy, to take unto Himself the soul of our dear brother here departed, we therefore commit his body to the ground, earth to earth, ashes to ashes, dust to dust, in sure and certain hope of the resurrection to eternal life;' and thanks are afterwards given—'For it hath pleased Almighty God to deliver this our brother out of the miseries of this sinful world;' and this is followed by a collect, in which it is prayed 'that when we shall depart this life we may rest in God, as our hope is that this our brother doth:' the hope here expressed is the same 'sure and certain hope of the resurrection to eternal life,' which is stated immediately after the expression, 'it hath pleased Almighty God, of His great mercy, to take to Himself the soul of our brother here departed.'

"In this Service, therefore, there are absolute expressions implying positive assertions; yet it is admitted that they cannot be literally true in all cases, but must be construed in a qualified or charitable sense—justified, we may believe, by a confident hope and reliance that the expression is literally true in many cases; and may be true even in the particular case in which to us it seems improperly applied. From this and other cases of the like kind, of which there are several in the Services, it seems manifest that devotional expressions, involving assertions, must not as of course be taken to bear an absolute and unconditional sense. The meaning must be ascertained by a careful consideration of the nature of the subject, and the true doctrine applicable to it.

"If expressions in devotional exercises, and exhortations which imply or convey assertions which certainly may be true in some cases, and which we are permitted in charity to hope, may be true in the particular cases to which we are directed to apply them, were such that the assertions must be accepted as universal propositions necessarily and unconditionally true in all cases, they would amount to declarations of doctrine: but in the Service for the Burial of the Dead, such implied assertions are clearly not to be taken to be universal propo-

sitions; and it is plain, that other assertions of the like kind, in other services, may fall within the same category.

"In the office for the Administration of the Public Baptism of Infants, the first Rubric states the reason why it is convenient that the administration should be when the most number of people come together. The reasons are stated to be, 'as well for that the congregation there present may testify the receiving of them that be now baptized into the number of Christ's Church; and also, because in the Baptism of Infants every man present may be put in remembrance of his own profession made to God in his baptism.' There is a prayer for the infant, that he (being delivered from wrath) may be received into the Ark of Christ's Church; and being stedfast in faith, joyful through hope, and rooted in charity, may so pass the waves of this troublesome world that he may come to everlasting life: another prayer, that the infant coming to God's Holy Baptism may receive remission of his sins by spiritual regeneration, and an exhortation to the congregation, or to those present, not to doubt, but earnestly to believe that God will favourably receive the present infant, and give unto him the blessing of eternal life,—'Wherefore, we being persuaded of the good will of our heavenly Father towards this infant, and nothing doubting but that he favourably alloweth this charitable work of ours in bringing this infant to his Holy Baptism, let us faithfully and devoutly give thanks to him:' and in the prayer which follows it is thus expressed,—'Give thy Holy Spirit to this infant, that he may be born again, and made an heir of everlasting salvation.' Before the ceremony is performed, the sponsors are questioned, and make their answers; and then comes the prayer, in which it is said, 'Regard, we beseech Thee, the supplications of this congregation: sanctify this water to the mystical washing away of sin; and grant that this child now to be baptized therein may receive the fulness of Thy grace, and ever remain in the number of Thy faithful and elect children.' Thus, studiously, in the introductory part of the Service, is prayer made for the grace of God, that the child may receive remission of his sins by spiritual regeneration;—so firm is the belief expressed that God will favourably receive the

infant;—so confident is the negation of all doubt but that God favourably alloweth the charitable work of bringing the infant to Baptism. All this is before the ceremony is actually performed; and after the Baptism has been administered, and during the continuance of the same persuasion, and the same undoubting confidence of a favourable reception and allowance, the priest is directed to say, 'Seeing now that this child is regenerate and grafted into the Church, let us give thanks unto Almighty God for these benefits;' and after repeating the Lord's Prayer, thanks are thus given,—'We yield Thee hearty thanks, that it hath pleased Thee to regenerate this infant with Thy Holy Spirit, to receive him for Thine own child by adoption, and to incorporate him into Thy Holy Church.' The Service is followed by the Rubric,—'It is certain by God's word that children which are baptized, dying before they commit actual sin, are undoubtedly saved.' And to the short form for the Administration of Private Baptism of children in houses, after a thanksgiving, 'for that it hath pleased God to regenerate this infant with His Holy Spirit, and to receive him as His own child by adoption, and to incorporate him into His Holy Church,' there is appended a Rubric,—'And let them not doubt but that the child so baptized is lawfully and sufficiently baptized, and ought not to be baptized again.' And if the child has not been so baptized by the minister of the parish, but by some other, the minister of the parish is to require by whom, with what matter, and with what words the child was baptized; and if satisfied, he is to certify that all is well done, and that the child being born in sin, and in the wrath of God, is now by the laver of regeneration in Baptism received into the number of the children of God and heirs of everlasting life.

"The Baptism thus referred to, and the effect of which is thus stated or expressed, is a Baptism which may have taken place without any prayer for grace, or any sponsors; but it seems plainly to have been intended only for cases of emergency,[1] in which death might probably prevent the ceremony, if not immediately performed; for such occasions, and the

[1] See the note made of this argument by Mr. Gorham, Ans. xvii. See also Judgment in Escott *v.* Mastin, pp. 21—23.

child dying, the Church holds the Baptism sufficient, and not to be repeated. One Baptism for the remission of sins is acknowledged by the Church. Nevertheless, if the child, which is after this sort baptized, do afterwards live, the Rubric declares the expediency of bringing it into the Church, and appoints a further ceremony with sponsors. The Private Baptism of Infants is an exceptional case provided for an emergency, and for which, if the emergency passes away, although there is to be no repetition of the Baptism, a full Service is provided. The adult person is not pronounced regenerate until he has first declared his faith and repentance; and before the act of Infant Baptism, the child is pledged by his sureties to the same conditions of faith and repentance. And these requirements of the Church, in her complete and perfect service, ought, upon a just construction of all the services, to be considered as the rule of the Church and taken as proof that the same promise, though not expressed, is implied in the exceptional case, when the rite is administered in the expectation of immediate death, and the exigency of the case does not admit of sureties. Any other conclusion would be an argument to prove that none but the imperfect and incomplete ceremony allowed in the exceptional case would be necessary in any case.

"This view of the Baptismal Service is, in our opinion, confirmed by the Catechism, in which, although the respondent is made to state that in his Baptism he 'was made a member of Christ, a child of God, and an inheritor of the kingdom of heaven,' it is still declared that repentance and faith are required of persons to be baptized; and when the question is asked, 'Why then are infants baptized, when by reason of their tender age they cannot perform them?' the answer is—not that infants are baptized because of their innocence they cannot be unworthy recipients, cannot present an *obex*, or hindrance to the grace of regeneration, and are therefore fit subjects for Divine grace—but, 'because they promise them both by their sureties, which promise when they come to age themselves are bound to perform.' The answer has direct reference to the condition on which the benefit is to depend, and the whole catechism requires a qualified or charitable

construction, such as must be given to the expression, 'God the Holy Ghost, who sanctifieth me and all the elect people of God.'

"It seems unnecessary for us to go through the other Formularies in the Prayer-book. The Services abound with expressions which must be construed in a charitable and qualified sense, and cannot with any appearance of reason be taken as proofs of doctrine. Our principal attention has been given to the Baptismal Services; and those who are strongly impressed with the earnest prayers which are offered for the Divine blessing, and the grace of God, may not unreasonably suppose that the grace is not necessarily tied to the rite; but that it ought to be earnestly and devoutly prayed for, in order that it may then, or when God pleases, be present to make the rite beneficial.

"One of the points left open by the Articles is determined by the Rubric,—'It is certain by God's word that children which are baptized, dying before they commit actual sin, are undoubtedly saved.' But this Rubric does not,[1] like the Article of 1536, say that such children are saved by Baptism; and nothing is declared as to the case of infants dying without having been baptized.

"There are other points of doctrine respecting the Sacrament of Baptism which we are of opinion are, by the Rubrics and Formularies (as well as the Articles), capable of being honestly understood in different senses; and consequently we think that, as to them, the points which were left undetermined by the Articles are not decided by the Rubrics and Formularies; and that upon these points all ministers of the Church, having duly made the subscriptions required by law, (and taking Holy Scripture for their guide) are at liberty honestly to exercise their private judgment without offence or censure.

"Upright and conscientious men cannot in all respects agree upon subjects so difficult; and it must be carefully borne in mind that the question, and the only question for us to decide, is, whether Mr. Gorham's doctrine is contrary or repugnant to the doctrine of the Church of England, as by

[1] This was the Argument of Dr. Bayford.

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law established. Mr. Gorham's doctrine may be contrary to the opinions entertained by many learned and pious persons, contrary to the opinion which such persons have, by their own particular studies, deduced from Holy Scripture—contrary to the opinion which they have deduced from the usages and doctrines of the Primitive Church, or contrary to the opinion which they have deduced from uncertain and ambiguous expressions in the Formularies; still, if the doctrine of Mr. Gorham is not contrary or repugnant to the doctrine of the Church of England, as by law established, it cannot afford a legal ground for refusing him institution to the living to which he has been lawfully presented.

"This Court, constituted for the purpose of advising Her Majesty in matters which come within its competency, has no jurisdiction or authority to settle matters of faith, or to determine what ought in any particular to be the doctrine of the Church of England. Its duty extends only to the consideration of that which is by law established to be the doctrine of the Church of England, upon the true and legal construction of her Articles and Formularies; and we consider that it is not the duty of any Court, to be minute and rigid in cases of this sort. We agree with Sir William Scott in the opinion which he expressed in Stone's case,[1] in the Consistory Court of London—'That if any Article is really a subject of dubious interpretation, it would be highly improper that this Court should fix on one meaning, and prosecute all those who hold a contrary opinion regarding its interpretation.'

"In the examination of this case, we have not relied upon the doctrinal opinions of any of the eminent writers, by whose piety, learning, and ability, the Church of England has been distinguished; but it appears that opinions, which we cannot in any important particular distinguish from those entertained by Mr. Gorham, have been propounded and maintained, without censure or reproach, by many eminent and illustrious prelates and divines who have adorned the Church from the time when the Articles were first established. We do not affirm that the doctrines and opinions of Jewel, Hooker, Usher, Jeremy Taylor, Whitgift, Pearson, Carlton, Prideaux

[1] See Appendix, p. 348.

and many others, can be received as evidence of the doctrine of the Church of England; but their conduct, unblamed and unquestioned as it was, proves, at least, the liberty which has been allowed of maintaining such doctrine.[1]

"Bishop Jewel writes,—'This marvellous conjunction, and incorporation with God, is first begun and wrought by faith.' . . . . 'Afterward the same incorporation is assured unto us, and increased in our baptism.' [A Reply unto Mr. Harding's Answer. Works, vol. i. pp. 140–1. Parker Soc. Ed.]

"Hooker writes,—'We justly hold it [Baptism] to be the door of our actual entrance into God's house, the first apparent beginning of life, a seal, perhaps, to the grace of Election, before received, but to our sanctification here, a step that hath not any before it.' [Eccles. Polity, b. v. ch. lx. § 3.]

"Archbishop Usher, in reply to the question,—'What say you of infants baptized that are born in the Church; doth the inward grace in their baptism always attend upon the outward sign?' answers, 'Surely, no; the Sacrament of Baptism is effectual in infants only to those, and to all those who belong unto the election of grace.' [Usher's Catechism, Works, 8th ed. 4to Lond. 1702, p. 367.]

"Bishop Jeremy Taylor says,—'Baptism and its effect may be separated, and do not always go in conjunction: the effect may be before, and therefore much rather may it be after its susception; the sacrament operating in the virtue of Christ, even 'as the Spirit shall move.'" [Life of our Saviour, Pt. IV. § ix. Discourse VI. of Baptism, Pt. II. § 2.]

"There was even a time when doctrine to this effect was required to be studied in our Church; and Whitgift, by a circular issued in the year 1588, enforced an order made in the year 1587, whereby every minister under the degree of Master of Arts was required to study and take for his model the Decades of Bullinger, as presented by the Queen and Upper House of Convocation. And there it is declared, amongst numerous passages of a like tendency,—'The first beginning of our uniting in fellowship with Christ is not

[1] This defines the position which the argument from the opinions of eminent writers ought to hold, and is somewhat different from the decision of the Dean of the Arches.

wrought by the Sacraments.' In baptism that is sealed and confirmed to infants which they had before.[1]

"So with respect to the charitable interpretation of Divine Services, Hooker says—"The Church speaks of infants, as the rule of charity alloweth both to speak and to think.'[2] [Eccles. Pol. b. v. ch. lxv. § 3.]

"Bishop Pearson says—'When the means are used, without something appearing to the contrary, we ought to presume of the good effect.' [Exposition of the Creed, Art. ix. p. 658. Camb. Ed. 1849.]

"Bishop Carleton says—'All that receive Baptism are called the children of God, regenerate, justified; for to us they must be taken for such in charity, until they show themselves other.' [An Examination, &c. in reply to Montagu.]

"And Bishop Prideaux says—'Baptism only pledges an external and sacramental regeneration, which the Church in charity pronounces that the Holy Spirit renders an inward regeneration.' [Appello Cæsarem, &c. Ed. Lond. 1626, 4to. p. 193.]

"We express no opinion on the theological accuracy of these opinions, or any of them. The writers whom we have cited are not always consistent with themselves, nor are the reasons upon which they found their positions always valid; and other writers of great eminence, and worthy of great respect, have expressed very different opinions. But the mere fact that such opinions have been propounded and maintained by persons so eminent and so much respected, as well as by very many others, appears to us sufficiently to prove that the liberty which was left by the Articles and Formularies has been actually enjoyed and exercised by the members and ministers of the Church of England.

[1] The words of which this sentence appears to be an epitome were quoted by Mr. Turner: "The holy and elect people of God are not then first of all partakers of the grace of God and heavenly gifts when they receive the Sacraments. For they enjoy the *things* before they be partakers of the signs.

[2] Mr. Moore, in reporting this passage, states in a note as follows:—

"The passage in Hooker, in the edition by Keble, Oxon, 1836, vol. ii. p. 398, is thus: 'We speak of Infants, *as the rule of piety* alloweth both to speak and to think.' The Reporter has not felt himself at liberty to alter this passage as given in the judgment, but he has been unable to verify it by reference to any edition of Hooker's Works; and is led to suppose that the error arose in transcribing the judgment for the perusal of the several Members of the Committee."

"The case not requiring it, we have abstained from expressing any opinion of our own upon the theological correctness or error of the doctrine held by Mr. Gorham which was discussed before us at such great length and with so much learning. His Honour the Vice-Chancellor Knight Bruce, dissents from our judgment;[1] but all the other members of the Judicial Committee, who were present at the hearing of the case (those who are now present, and Baron Parke, who is unavoidably absent on circuit,) are unanimously agreed in opinion; and the judgment of their Lordships is, that the doctrine held by Mr. Gorham is not contrary, or repugnant to the declared doctrine of the Church of England as by law established, and that Mr. Gorham ought not, by reason of the doctrine held by him, to have been refused admission to the Vicarage of Brampford Speke.

"We shall, therefore, humbly report to Her Majesty, that the Sentence pronounced by the learned Judge of the Arches Court of Canterbury ought to be reversed, and that it ought to be declared that the Respondent, the Lord Bishop of Exeter, has not shown sufficient cause why he did not institute Mr. Gorham to the said Vicarage.

"We shall humbly advise Her Majesty to remit the cause with that declaration to the Arches Court of Canterbury, to the end, that right and justice may there be done in this matter, pursuant to the said declaration."

The following is the Order in Council, embodying the report of the Judicial Committee:—

"At the Court at Buckingham Palace, the 9th day of March, 1850.

Present.

THE QUEEN'S MOST EXCELLENT MAJESTY.
HIS ROYAL HIGHNESS PRINCE ALBERT.

LORD PRESIDENT.	LORD JOHN RUSSELL.
LORD CHAMBERLAIN.	VISCOUNT PALMERSTON.
MARQUIS OF CLANRICARDE.	MR. FOX MAULE.
EARL OF CARLISLE.	SIR JOHN HOBHOUSE, BART.
EARL GREY.	SIR GEORGE GREY, BART.

[1] See the allusion to this in Introduction, p. lxxiv. The assent of the Archbishops and the dissent of the Bishop of London is stated at p. 84.

WHEREAS there was this day read at the Board, a Report from the Judicial Committee of the Privy Council, dated the 8th of March instant, in the words following, viz.:—

"Whereas your Majesty was pleased, by your General Order in Council of the first day of November, 1848, to refer to this Committee the humble petition of Charles Bowdler and Henry Allen Bathurst, Proctors for the Reverend George Cornelius Gorham, clerk, the Appellant in a certain cause of appeal and complaint of nullity from a certain decree or order of the Official Principal of the Arches Court of Canterbury, given and pronounced on the 2nd day of August, 1849, in a certain cause or business of monishing the Right Reverend Father in God Henry, by Divine permission, Lord Bishop of Exeter, to admit the said Reverend George Cornelius Gorham, clerk, to the vicarage and parish church of Brampford Speke, in the county of Devon, diocese of Exeter, and province of Canterbury; and to institute and invest the said Reverend George Cornelius Gorham, clerk, to the vicarage aforesaid, with all its rights, members, and pertinents, and to cause the said Reverend George Cornelius Gorham, clerk, to be inducted into the real, actual, and corporal possession of the same, or to show reasonable and lawful cause to the contrary, promoted and brought by the said Reverend George Cornelius Gorham, clerk, against the said Lord Bishop of Exeter.

"And whereas an appearance was afterwards given before a Surrogate of this Committee by a Proctor on behalf of the said Lord Bishop of Exeter, the Respondent in the said cause of appeal.

"The Lords of the Committee, in obedience to your Majesty's said order of reference, took the said petition into consideration, and having read the proceedings and evidence transmitted from the Court below, and on five former days heard Counsel and Proctors on both sides, did this day humbly report their opinion to your Majesty in favour of the said appeal and complaint; that the decree or order of the said Official Principal of the Arches Court of Canterbury appealed from ought to be reversed; that it ought to be declared that the said Lord Bishop of Exeter has not showed sufficient cause why the said Reverend George Cornelius Gorham, clerk, should not be instituted into the vicarage of Brampford Speke aforesaid; and their Lordships did further agree humbly to report their opinion to your Majesty, that the principal cause ought to be remitted to the said Official Principal of the Court from which the

said appeal was brought, to the end that right and justice may be there done and administered in the premises in pursuance of such declaration."

"Her Majesty having taken the said Report into consideration, was pleased, by and with the advice of her Privy Council, to approve thereof, and of what is therein recommended, and to order as it is hereby ordered, that the same be duly and punctually observed, complied with, and carried into execution. Whereof the said Official Principal of the Arches Court of Canterbury and all other persons whom it may concern, are to take notice and govern themselves accordingly.

(Signed) W. L. BATHURST."

On the first day of the following Term (April 15th, 1850) the validity of this decision was called in question before the Court of Queen's Bench[1] on a motion for a prohibition. An action of Quare impedit had been commenced in this Court by the Attorney-General, on behalf of the Queen, as patron of the living of Bramford Spoke, as early as Michaelmas Term, 1848. This action was allowed to stand over, until the proceeding by Duplex Querela should be terminated, and was still depending when Sir Fitzroy Kelly, on behalf of the Bishop of Exeter, moved for a rule to show cause why a prohibition should not issue to the Dean of Arches and the Archbishop of Canterbury, to prohibit them from instituting Mr. Gorham, or otherwise carrying into execution the Order of Her Majesty in Council of March 9th, 1850.

The motion was founded on an affidavit by the Bishop of Exeter, detailing the history of the case from the presentation of Mr. Gorham to the Order in Council, stating that a monition from the Arches Court, in accordance therewith, had already been served on him (the Bishop), and averring that, since the date of the Order, he had been advised, for the first time, that Her Majesty in Council had no power to entertain the appeal.

Sir F. Kelly maintained, on behalf of the Bishop, (1) that, in a matter touching the Crown, an appeal does not lie to the Queen in Council, but lies to the Upper House of Convocation; (2) that, although judgment has been given on the appeal, a prohibition still lies. The second proposition was admitted by the Court without argument. In support of the first, Sir F. Kelly relied on

[1] Lord Campbell, Justices Patteson, Wightman, and Erle.

the joint effect of 24 H. 8. c. 12, and 25 H. 8. c. 19.[1] The former of these statutes gives a final resort to the Archbishop's Court, in all causes testamentary, matrimonial, &c. except those which may "touch the King," in which cases an ultimate appeal is given to the Upper House of Convocation; the latter enacts that all ecclesiastical appeals whatsoever shall be prosecuted in the same manner as matrimonial causes, &c. but goes on to provide that, for lack of justice in any Archbishop's Court, a further appeal shall lie to a Commission of Delegates. This provision, Sir F. Kelly contended, did not apply to causes touching the Crown, which remained subject to the exception established by the first Act (24 H. 8. c. 12). On the 25th of April, judgment was de-delivered by Lord Campbell.

"This was a motion for a rule to show cause why a writ of prohibition should not issue to the Dean of the Arches and to the Archbishop of Canterbury.

"Having myself sat as a member of the Judicial Committee when the appeal referred to was heard, I should abstain from giving any opinion upon the propriety of granting this motion, if the application were connected with any point then argued and decided: but the Lord Bishop of Exeter in his affidavit states that 'he was not, at the time of the hearing of the said appeal before the said Judicial Committee, nor for some time afterwards, informed or aware of the objection now made;' and certainly it never was brought forward, or, as far as I know, thought of, either by the counsel or the members of the Court, till after the decision had been pronounced. It is therefore as new to me as to my learned brothers who now sit on the bench along with me.

"The objection is that Mr. Gorham had no right by law to appeal to the Queen in Council for the purpose of bringing the case before the Judicial Committee, and that he could only appeal from the judgment of the Court of Arches to the Upper House of Convocation. If this objection be well founded in point of law, it does not come too late, and the prohibition ought to be awarded to stay the execution of the sentence; for, on this supposition, the judgment of the Court of Arches against Mr. Gorham remains unreversed, the proceedings before the Judicial Committee and before Her Majesty in Council must be considered wholly void, and, the want of jurisdiction appearing on the face of the sentence, advantage may still be taken of the nullity. But, after a very attentive and

[1] See the sections given in the Introduction, pp. xxxvi.—xli.

anxious consideration of the statutes and authorities relied upon, we are all of opinion that the objection is unfounded, and that the course taken by Mr. Gorham upon judgment being given against him in the Court of Arches was a course which it was perfectly competent to him to take for the purpose of having that judgment reviewed.

"The case turns almost entirely upon the two statutes, 24 H. 8. c. 12, and 25 H. 8. c. 19. Sir Fitzroy Kelly, in his lucid argument, contended that, according to the just construction of these statutes, in all causes which touch the Queen, the only appeal given from the Archbishop's Court is to the Upper House of Convocation; and that this cause between Mr. Gorham and the Bishop of Exeter touches the Queen, because Her Majesty is patron of the living of Brampford Speke. Upon this last point we do not feel it necessary to give any opinion, as we clearly think that, if the Queen really had an interest in the question whether Mr. Gorham is or is not of unsound doctrine, her right to present a fit clerk to the living of Brampford Speke not being in controversy, still that the Legislature never gave a power to appeal in such a cause to the Upper House of Convocation.

"Sir Fitzroy Kelly very properly admits that the appeal he contends for was not given by stat. 24 H. 8. c. 12. That statute was passed when Sir Thomas More, a rigid Roman Catholic, was Lord Chancellor,[1] and when Henry had not yet broken with the See of Rome. Therefore it still allows an appeal to the Pope in all spiritual suits; and it was framed upon the principle that,

[1] This is an error of fact. But the statement of the next paragraph is true, and can be verified by reference to the Statutes themselves. See Introd. p. xxx.

It may be well to give the date of the important events of the period to which reference is here made:—

1532.	May 6th.	More resigns the Chancellorship.
	Aug. 23d.	Archbishop Warham dies.
1533.	Jan. 25th.	Henry secretly marries Anne Boleyn.
	Feb. 4th.	Parliament meets—24 Hen. VIII.
	Mar. 30th.	Archbishop Cranmer consecrated.
	May 23d.	Sentence of divorce pronounced by Cranmer.
1534.	Jan. 15th.	Parliament meets—25 Hen. VIII.

These dates are taken from Collier, Burnet, and Froude, who all agree in them, except that Collier places the secret marriage as early as Nov. 14th, 1532. The new style has been adopted in stating them. The confusion as to dates has probably arisen from the fact that by the old style the old year was considered not to end till March, so that the statutes are sometimes dated (*e.g.* in Stephens' Eccles. Statutes) by the old year.

while all temporal matters which were discussed in the Ecclesiastical Courts should be finally determined by Courts sitting within the realm, the spiritual jurisdiction which belonged to the Pope as supreme head of the Western Church should remain unaffected. Accordingly this statute is confined to causes about wills, to causes about matrimony and divorce, and to causes about tithes and oblations. Respecting these three classes of causes it is enacted that the appeal should be from the Archdeacon to the Bishop, and from the Bishop to the Archbishop, whose judgment was to be final; cutting off the appeal to Rome which otherwise would have lain. The 9th section of the act provides that, if in 'the causes before rehearsed' there shall be matter in contention which may touch the King, the party aggrieved shall or may appeal to the spiritual prelates and other abbots and priors of the Upper House assembled in Convocation, whose determination is to be final. But an appeal from the Archbishop's Court in a suit upon a Duplex Querela involving the question whether the Clerk presented to a living by the King was of unsound doctrine would still have gone to Rome.

"In the following year Henry, finding that there was no chance of succeeding in his divorce suit with the sanction of the Pope, and being impatient to marry Ann Boleyn, resolved to break with Rome altogether, and, preserving all the tenets of the Roman Catholic faith, to vest in himself the jurisdiction which the Pope had hitherto exercised in England. Sir Thomas More had now resigned the Great Seal; and it was held by the pliant Lord Audley, who was ready to adopt the new doctrines in religion, or to adhere to the old, as suited his interests.

"In a new session of parliament several statutes were passed, which, in addition to further regulating appeals, put a stop to the payment of first fruits and Peterpence to the Bishop of Rome, forbade the investiture of English bishops or archbishops by the Bishop of Rome, gave power to the King to nominate bishops, in default of election by the dean and chapter, under a *congé d'élire*, prohibited dispensations or licences from the Bishop of Rome, and declared the King to be Supreme Head of the Church, with power to 'repress, redress, reform, order, correct, restrain and amend all such errors, heresies, abuses, offences, contempts and enormities,' 'which by any manner, spiritual authority, or jurisdiction ought or' might 'lawfully be reformed, repressed, ordered, redressed, corrected, restrained or amended' 'for the conservation of the peace,

unity, and tranquillity of this realm.' The first of these statutes was 25 H. 8. c. 19, which put an end to all appeals to Rome in all cases whatsoever, and enacted, by section 3, 'that all manner of appeals, of what nature or condition soever they be of or what cause or matter soever they concern, shall be made and had by the parties grieved' 'after such manner, form and condition, as is limited' by the former act of parliament; that is to say from the Archdeacon to the Bishop and from the Bishop to the Archbishop. No exception is introduced respecting causes which touch the King; and on the contrary the enactment is expressly extended to all causes, of whatever nature they be, and whatever matter they may concern. But all doubt is removed by the following section (4), which creates a new Court of appeal for all causes in the Ecclesiastical Courts. Instead of allowing the decision of the Archbishop to be final, as it was by stat. 24 H. 8. c. 12, the legislature now enacted that 'for lack of justice at or in any of the Courts of the Archbishops,' 'it shall be lawful to the parties grieved to appeal to the King's Majesty in the King's Court of Chancery,' where delegates are to be appointed under the Great Seal, who are to adjudicate upon the appeal. This appeal is given in all causes in the Courts of the Archbishops of this realm, as well in the causes of a purely spiritual nature which might hitherto have been carried to Rome, as in the classes of causes of a temporal nature enumerated in stat. 24 H. 8. c. 12.

"The meaning of the legislature is still further proved by sect. 6 of the new statute, which enacts that all manner of appeals hereafter to be taken from the jurisdiction of any abbots, priors, and places exempt from the jurisdiction of the ordinary, shall be to the King's Majesty in the Court of Chancery, in like manner and form as heretofore to the See of Rome; no exception being introduced respecting causes which touch the King, although it was then notorious that the causes touching the King might be taken to Rome, Pope Clement having recently evoked Henry's divorce suit from before Cardinals Wolsey and Campeggio, sitting at White Friars, to be determined by his Holiness in the Vatican.

"The construction which the words of the statute seem to me to require is expressly put upon them by Lord Coke. In his 4th Institute, p. 340, commenting upon the stat. 25 H. 8. c. 19, this great lawyer says: 'A general prohibition, that no appeals shall be pursued out of the realm to Rome, or elsewhere. Item, a general clause that all manner of appeals, what matter soever

they concern, shall be made in such manner, form and condition within the realm, as it is above ordered by 24 H. 8. in the three causes aforesaid; and one further degree in appeals *for all manner of causes* is given, viz. from the Archbishop's Court to the King in his Chancery, where a commission shall be awarded for the determination of the said appeal, and from thence no further.'

"In practice, such is the construction that has been invariably put upon the statute for above three centuries, without any doubt being started upon the subject till the present motion was made. During this long period of time there have been many suits decided in the Archbishop's courts in which the Crown has been concerned, respecting testaments and tithes, and also of a spiritual nature, if this Duplex Querela touches the Queen. We know that in many of these the decision in the Archbishop's courts was not satisfactory. According to what is now contended for, the appeal ought always to have been to the Upper House of Convocation. But there is no trace of any such appeal ever having been brought. On the contrary, there seems every reason to believe that the appeal has uniformly been to the King in the Court of Chancery, where commissioners have been appointed, or, in common language, to 'the High Court of Delegates.' The causes of this sort which are most likely to occur are testamentary, respecting the administration of the goods of persons who die intestate without any known relations. If such persons die intestate, or their wills are invalid, the Sovereign is entitled to the administration of their personal property; and the right of the Crown may depend upon the validity of the wills which they execute, or on questions of pedigree with claimants who allege themselves to be the next of kin. One instance will be found in 1 Phillimore, 170, in which the Crown was directly interested, and Sir William Scott appeared, as King's advocate, for the Crown. The decision being against the Crown, there was an appeal from the Dean of the Arches to the Court of Delegates: and I am informed by practitioners in Doctors Commons that, as often as there has been an appeal in such a suit, it has followed the same course.

"This statement rests on oral testimony. But there are two precedents to which I can refer with entire confidence, and which, being unopposed by any of a contrary tendency, are, I think, sufficient to show the usage in construing the statute. The first occurred not long after the statute passed, and is to be found in

Dyer, 273.[1] The appointment of the dean of Wells being vested by act of parliament in the Crown, King Edward VI. by letters patent appointed one Goodman dean, who was thereupon installed. Afterwards the Bishop of Bath and Wells, acting under the authority of the King, pronounced sentence of deprivation of the deanery against Goodman. There was an appeal to the Archbishop; and he confirmed the sentence of deprivation. Goodman, considering himself aggrieved, resolved to appeal. Now this suit touched the King; for he was a party to the proceeding as well as patron of the deanery. According to the argument at the Bar the appeal ought to have been to the Upper House of Convocation. But the appeal was to the King in Chancery: and, Delegates being appointed, they, after argument, confirmed the sentence. Edward VI. thereupon, by Letters Patent, appointed to the deanery one Turner, who was installed. But, on the accession of Queen Mary (Goodman, I presume, being a Roman Catholic, and Turner a Protestant), she, on Goodman's petition, issued a fresh commission of Delegates to review the sentence of the former Delegates; and, if the appeal ought to have been to the Upper House of Convocation, this proceeding was *coram non judice*. But the new Delegates reversed the sentences against Goodman, and restored him to the deanery. Goodman enjoyed the deanery till the death of Queen Mary. Turner then petitioned Queen Elizabeth for a new commission of Delegates to review the sentence against him. She granted a new commission of Delegates; and they removed Goodman, and restored Turner. Goodman petitioned for another commission of Delegates. This, to show her impartiality, the Queen granted. But the new Delegates finally decided in favour of Turner; and he enjoyed the deanery under their sentence till the time of his death. Much litigation arose respecting the acts of the rival deans while they were respectively in possession. These perplexing questions were debated before Chief Justice Catlyn, Chief Justice Wray, and several other most learned judges. They might have been easily solved by the doctrine that all the proceedings subsequent to the sentence of the Archbishop were null and void, the appeal not having been to the Upper House of Convocation; but not a doubt was whispered respecting the appeal having been duly brought to the King in Chancery under the 4th section of stat. 25 H. 8. c. 19: and full effect was giving to the sentences

[1] Walrond *v.* Pollard. A question of leases, the validity of which depended upon the tenure of the Deanery of Wells.

pronounced by four successive commissions of Delegates in three successive reigns.

"The other case, to which I refer, occurred under my own observation while I had the honour to hold the office of Chancellor of the Duchy of Lancaster. A doubt had long existed whether the goods of persons dying in the County Palatine of Lancaster intestate, and without next of kin, belonged to the Sovereign in right of the Crown or in right of the Duchy of Lancaster; a distinction which became of practical importance from the time when, by the arrangement of the Civil List, all the casual revenues of the Crown were payable to the Consolidated Fund, while such casual revenues arising from the Duchy were still allowed to go into the royal Privy Purse. Upon the death of a person in the County Palatine intestate and without next of kin, the claim of a grant of administration of his personal property was made by one proctor in right of the Crown and by another in right of the Duchy. In the Court of the Diocesan, the Bishop of Chester, the decision was in favour of the Crown; but, on an appeal to the Archbishop of York, the Metropolitan of the province, the sentence was reversed, and administration was ordered to the nominee of the Duchy. There can be no doubt that this cause touched the Queen; for, in different capacities, she was the sole litigant: the appeal ought, therefore, emphatically to have been to the Upper House of Convocation, if such an appeal could in any case lie. No one dreamed of such a proceeding. The appeal was not brought before the Delegates, only because the statutes 2 and 3 W. 4. c. 92, and 3 and 4 W. 4. c. 41, had passed, by which all the powers of the High Court of Delegates, both in ecclesiastical and maritime causes, had been transferred to the King in Council, and the Judicial Committee of the Privy Council had been established, by which, in reality, all such appeals were to be determined. The appeal was prosecuted there, exactly as if it had been between subject and subject. It was argued at great length before Lord Brougham, Lord Langdale, Mr. Baron Parke, Sir Herbert Jenner Fust, Dr. Lushington, and Mr. Pemberton Leigh. I myself sat at the Bar, assisting the counsel for the Duchy. The report of the Judicial Committee was in our favour, confirming the decree of the Court of the Archbishop of York: and this was confirmed by Her Majesty in Council. The administration was accordingly granted to the nominee of the Duchy; and the question was considered to be solemnly and legally settled. But, if the argument of Sir Fitzroy Kelly ought to prevail, the

question must remain doubtful till it is decided by the Upper House of Convocation for the province of York.

"Were the language of stat. 25 H. 8. c. 19, obscure instead of being clear, we should not be justified in differing from the construction put upon it by contemporaneous and long continued usage. There would be no safety for property or liberty if it could be successfully contended that all lawyers and statesmen have been mistaken for centuries as to the true meaning of an old act of parliament.

"We have been called upon to recollect that the Upper House of Convocation would be a much fitter tribunal than the Judicial Committee to decide such questions as arose in the appeal between Mr. Gorham and the Bishop of Exeter: but, if these, and likewise questions about wills, about marriages, and about tithes (which must follow the same rule), might be better decided by divines than by judges regularly trained in profession of the law and accustomed to administer justice in other courts, we cannot be influenced in our decision by any view to public policy. Sitting here, we can only interpret the law, and try to discover the intention of the legislature from the language of the statute book. Proceeding upon this principle, we all think that no reason has been shown to invalidate the sentence on the alleged ground that the Queen in Council and the Judicial Committee had no jurisdiction over the appeal. And, none of us entertaining any doubt respecting the legality of the course which has been pursued, we feel bound to say that a rule to show cause why a prohibition should not issue to stay the execution of the sentence ought not to be granted."

Rule refused.

Similar motions were made in the course of the same year in the Courts of Exchequer and Common Pleas, but without success.

WEST *v.* JOHNSON.

1856.

THE Members of the Judicial Committee present at this Appeal were :—

DR. LUSHINGTON.	SIR JOHN PATTESON.
MR. PEMBERTON LEIGH.	SIR W. H. MAULE.

In this case an appeal had been interposed from a sentence of the Arches Court, suspending the Appellant, the Rev. Robert West, for two years *ab officio et beneficio*. An inhibition was extracted and served, and a libel given in and admitted, and issue joined upon it. The Appellant's proctor afterwards exhibited a special proxy under the Appellant's hand and seal, and by virtue thereof declared that the Appellant proceeded no further in the appeal.

Dr. Phillimore, for the Respondent (Edward William Johnson), now moved to dismiss the Appeal and to confirm the sentence appealed from, and to remit the cause to the Arches Court of Canterbury, and to condemn the Appellant in the costs of appeal.

On the 20th of June, 1856, their Lordships ordered accordingly.

LIDDELL *v.* WESTERTON.

1857.

THE Members of the Judicial Committee who sat upon this Appeal were:—

THE LORD CHANCELLOR (Cranworth). MR. PEMBERTON LEIGH.
LORD WENSLEYDALE. SIR JOHN PATTESON.
SIR WILLIAM H. MAULE.

The ARCHBISHOP of CANTERBURY (Sumner), and the BISHOP of LONDON (Tait), were summoned, by command of Her Majesty, to attend and advise at the hearing.

[The following points were decided by this Judgment:—

1. All the articles used in the performance of the services and rites of the Church are "ornaments" within the meaning of the Rubric at the beginning of the Prayer-book, which is in the following words: "And here it is to be noted that such ornaments of the Church, and of the Ministers thereof, at all times of their ministrations, shall be retained and be in use as were in this Church of England, by the authority of Parliament, in the second year of the reign of King Edward VI."

2. This Rubric is confined to those articles, the use of which in the services and ministrations of the Church is prescribed by the First Prayer-book of Edward VI. and does not apply to articles set up in churches as decorations.

3. Crosses used as mere emblems of the Christian faith, and not as objects of superstitious reverence, may lawfully be erected as architectural decorations of churches.

4. The Communion Table, as required by the eighty-second Canon, must be of wood and moveable, and capable of being covered with a linen cloth, and no cross may be attached thereto.

5. A Credence Table is an adjunct to the Communion Table, and may lawfully be used.

6. The use of embroidered cloths for the Communion Table during the time of Divine service is not illegal, but is a subject for the discretion of the Ordinary. Embroidered linen and lace may not be placed on that Table at the time of the ministration of the Holy Communion.]

These cases, the origin of which is sufficiently explained in the opening paragraphs of the Judgment, were first argued and decided in the Consistory Court of the Bishop of London,

and afterwards in the Arches Court of Canterbury, whence they were carried by appeal before the Judicial Committee. Before the two suits were instituted in the Consistory Court, some correspondence passed between Mr. Westerton, the Plaintiff in the former, and Churchwarden of St. Paul's, Knightsbridge, and the Bishop of London, on the same points which subsequently became the subject of judicial decision. These points were the following:—the so-called "high altar" at St. Paul's with the cross attached to it (both of wood), the gilded candlesticks, the credence table, and the altar-coverings, used at the same church.

On the 28th of March, 1854, Mr. Westerton received a letter from the Bishop, declining to order the removal of any of these articles. The Bishop declared his opinion that the so-called "altar," being of wood and moveable, was a lawful Communion-table. He intimated his personal disapproval of candlesticks, but would not formally interdict the use of them. He expressed a more decided objection to the cross on the Communion-table, and explained his reason for not insisting upon it earlier, but doubted his authority to interfere with it, except through a decree in the Consistory Court. He took the same ground with respect to the credence-table, the legality of which at the same time he questioned, inasmuch as it is not mentioned in the Rubric or Canons. The embroidered covers he also censured, but denied that the use of them was contrary to any Rubric or Canon. Thereupon Mr. Westerton applied for a faculty to remove the obnoxious articles, which was resisted by Mr. Liddell, the incumbent, and Mr. Horne, the other Churchwarden.

About the same time, similar questions had arisen about the interior arrangements and decorations of St. Barnabas, a chapel of ease within the district of St. Paul, and especially as to a stone altar with a metal cross thereon, a credence-table, a wooden screen, dividing the chancel from the nave, with a wooden cross thereon, and certain altar-coverings like those in dispute at St. Paul's. Mr. Beal, an inhabitant of the chapelry of St. Barnabas, came forward and applied for a monition to the Chapel-wardens to remove all these, and this was the subject of the second suit.

The two causes were argued together, and the Judgment of the Consistory Court was delivered by Dr. Lushington on the 5th of December, 1855. The Judge, after premising that any discretion that might be confided to him was "a judicial discretion to be exercised according to authority and practice," proceeded to enumerate the standards of authority by which he considered himself bound, viz. Statutes, Canons, Ecclesiastical Common Law, Judicial decisions, and Usage. With respect to the Communion and credence-tables he held himself bound by the decision in "*Faulkner* v. *Litchfield*,"[1] and upon this authority condemned the Communion-table at St. Barnabas, being of stone and immoveable, as well as the two credence-tables; the Communion-table at St. Paul's, being of wood and moveable (though very massive), he pronounced to be within the letter of the law. He then proceeded to the consideration of the other articles in dispute, which he held to be governed by the direction in the Book of Common Prayer, prescribing the use of "such ornaments of the Church and of the Ministers thereof . . . as were in this Church of England, by the authority of Parliament, in the second year of the reign of King Edward the Sixth."

Dealing first and principally with crosses, he arrived, after an elaborate inquiry, at the conclusion indicated in the following passage:—

"I think it must be admitted on all hands that, though beyond doubt crosses and crucifixes were in use prior to the Reformation, there is no direct proof that they were in use at all in the second year of King Edward the Sixth, much less by authority of Parliament; that all the great divines of our Church during the times of Edward the Sixth and Queen Elizabeth, including Archbishop Whitgift, denounced them as superstitious, and succeeded in having them removed, by the authority of the Crown, from all our parish churches; that for a very short period in the time of Archbishop Laud, they were revived; that the use of them was soon abolished, and to the present day their introduction has never again been attempted. It appears to me, therefore, that the affirmative evidence derived from their having at one time existed,

[1] Robertson's Eccl. Rep. p. 184.

and the presumption that they were continued (the use of crosses not having been abolished *nominatim*)—their temporary revival in the time of Charles the First, and the opinion of Archbishop Laud and those who thought with him,—opposed as it is to the contemporaneous exposition in the time of Queen Elizabeth, to the decided opinions of all those eminent divines who are to be deemed either amongst our first Reformers, or who immediately succeeded them, and who must have best known, not only what was intended to have been done, but what was done,—and further opposed as it is to the uninterrupted usage of the last three hundred years,—is not sufficiently strong; and, lastly, that the resurrection from this long sleep of a practice notoriously abused to idolatrous purposes is in the very teeth of the principles and intentions of the Reformation,—principles which, it has been hinted, I ought not on this occasion to bring into consideration, but which I think I am bound to bear in mind in the construction of all public acts done to effectuate and consummate that blessed change. I disclaim founding my decision upon the Statute of the Third and Fourth of Edward the Sixth, cap. 10;[1] but, for the reasons stated, can I hesitate as to the conclusion to which I must arrive? I need hardly say that I come to the conclusion that the cross in St. Paul's and the two crosses in St. Barnabas' are not warranted by law."

Passing next to the question of candlesticks and candles, he decided that although the use of lighted candles on the Communion-table is unlawful unless for the purpose of giving necessary light, yet that candlesticks and unlighted candles, whether open to just objection or not, may lawfully be retained.

The embroidered linen cloths used at both churches to deck the Communion-table during the ministration of the Sacrament, and the various coloured coverings displayed there at other times, he condemned as contrary to the spirit of the Rubric and of the 82d Canon; the former of which enjoins the use of "a fair white linen cloth" at the Communion time, while the latter ordains that the table shall be

[1] An Act for the abolishing and putting away of divers Books and Images.

covered "with a carpet of silk or other decent stuff" in the time of Divine Service.

Dismissing, lastly, the exception to the screen and brazen gates as untenable, he concluded with some remarks on the duty of an Ecclesiastical Court to enforce, within the limits of its jurisdiction, the great principles of the Reformation.

So far, therefore, as they applied to the credence-tables, crosses, altar-cloths, and the stone altar at St. Barnabas, the faculty and monition prayed by Messrs. Westerton and Beal were granted by the Court, but no costs were given.

From this decision Mr. Liddell and his Co-defendant appealed to the Arches Court, and on the 20th of December, 1856, the Dean of the Arches (Sir J. Dodson) delivered his Judgment, confirming that of the Court below in all respects, but not on precisely the same grounds as those assigned by Dr. Lushington. Sir J. Dodson concurred in regarding crosses as "ornaments," but upon a review of certain Statutes passed in the reign of King Henry VIII.[1] he was not prepared to affirm that at the accession of Edward VI. there was no Parliamentary authority for the use of any ornaments whatever in the Church.[2] Upon the whole, however, he came to the conclusion that crosses, being "ornaments," and ornaments that had been abused, were prohibited by the Injunctions issued by Edward VI. in 1547, and therefore could not be said to be in use, within the meaning of the Rubric, in the second year of that King's reign. He then examined the argument founded on usage, and declared himself satisfied on this ground also, that no authority can be claimed for crosses. He disposed of the remaining points in accordance with the Judgment of the Court below, and without introducing any new topics of argument.

From this sentence the Rev. Mr. Liddell, and Mr. Horne, the Churchwarden of St. Paul's, and Messrs. Parke and Evans, the Chapel-wardens of St. Barnabas, severally appealed to Her Majesty in Council, praying that such sentence of the

[1] 25 Henry VIII. cap. 19, sect. 7. 27 Henry VIII. cap. 15. 35 Henry VIII. cap. 16, sect. 2.

[2] The learned Judge called attention to the statute 1 Edward VI. cap. 12, sect. 5, which had not been noticed in the arguments or by the Court below.

Arches Court, as well as the former sentence of the Consistory Court, might be reversed, and the Appellants dismissed from all further observance of justice in the suits, and that the Respondents might be respectively condemned with costs, for the following reasons:—First, because the ornaments directed to be removed were not shown to be contrary to any law, or inconsistent with any doctrine of the Church of England; Secondly, because many years ago they were dedicated to the use of the said churches by the munificent piety of attached members of the Church of England, and were sanctioned by the Ordinary at the time of the consecration of the said Churches; and Thirdly, because their removal now, after the lapse of many years, would inflict great pain upon the majority of the parishioners who frequented the said churches, and would be inconsistent with the respect due to the religious liberty of the subject. The Respondents, Messrs. Westerton and Beal, on the other hand, prayed that the decree appealed from might be affirmed with costs.

The appeals were consolidated, and heard together on the 9th, 10th, 11th, 12th, 13th, 14th, and 16th days of February, 1857, before the Judicial Committee of the Privy Council.

The counsel were Sir Fitzroy Kelly, Q.C., and Dr. Phillimore for the Appellants, and Dr. Bayford and Mr. Stephens for the Respondents.

The Court took time for consideration, and on the 21st of March, 1857, Judgment in both appeals was delivered by Mr. Pemberton Leigh.[1]

"These cases come before the Court by appeal from two orders in distinct suits, directing the removal of various articles of Church furniture; in the one case, from the District Church or Chapel of St. Paul's, Knightsbridge, and, in the other, from the Chapel of Ease of St. Barnabas, Pimlico. Although there is some distinction between the circumstances of the two cases, they involve the same principles; they were included in one argument at this Bar, and will be conveniently disposed of in one judgment.

"It appears that the District Church of St. Paul's was erected by private subscription; that the income by which it

[1] Now Lord Kingsdown.

is supported is derived from the rent of pews; that Mr. Liddell is the incumbent, and Mr. Horne and Mr. Westerton the two Churchwardens. The two Churchwardens differed as to the propriety of certain ornaments of the Church, and in Hilary Term, 1855, the suit out of which the present appeal arises was instituted in the Consistory Court of London, by Mr. Westerton, against Mr. Horne and Mr. Liddell, who are now the Appellants.

"The citation called upon the Appellants to show cause why a faculty should not be granted for removing the Altar, or high altar, and the cloths used for covering the same, together with the wooden cross elevated thereon and affixed thereto, as well as the candlesticks thereon, together with the credentia, preparatory altar, or credence-table, used in the said Church or Chapel, and for substituting in lieu and stead thereof, a decent and proper Table for the administration of the Lord's Supper and Holy Communion, and a decent cloth for the covering thereof.

"The answer of the Defendants alleges, that the article of Church furniture, called in the citation, an 'Altar, or high altar,' is in fact, and according to the true and legal interpretation of the 82d of the Constitutions and Canons of England and Ireland,[1] as by law established, 'mensa congrua et decens,' or a convenient and decent Table, such as is required by law

[1] The words of the 82d Canon are as follows:—

"Whereas we have no doubt, but that in all churches within the realm of England, convenient and decent Tables are provided and placed for the celebration of the Holy Communion, we appoint that the same tables shall from time to time be kept and repaired in sufficient and seemly manner, and covered, in time of Divine Service, with a carpet of silk or other decent stuff thought meet by the Ordinary of the place, if any question be made of it, and with a fair linen cloth at the time of the administration, as becometh that Table, and so stand, saving when the said Holy Communion is to be administered: at which time the same shall be placed in some good sort within the Church or Chancel, as thereby the minister may be more conveniently heard of the communicants in his prayer and ministration, and the Communicants also more conveniently, and in more number, may communicate with the said Minister; and that the Ten Commandments be set up on the East end of every Church and Chapel, where the people may best see and read the same, and other chosen sentences written upon the walls of the said Churches and Chapels, in places convenient: and likewise that a convenient seat be made for the Minister to read service in. All these to be done at the charge of the parish.

for the celebration of the Holy Communion, and denies that the wooden cross is inconsistent with the Laws, Canons, Customs,[1] and Constitutions of the said Church. In subsequent passages of the answer this Table is always spoken of as the Altar, or Communion Table, and, it is alleged that the said Altar or Communion Table, and the platform on which the same is raised, the wooden cross attached thereto, the gilded candlesticks, and the said side-table, or credence-table, were placed in the same Church as the same now exist, and formed part of the furniture thereof at the time of the consecration of the said Church and of the furniture thereof by the Lord Bishop of London, on the 30th of May, 1843.[2]

"Their Lordships understand that this Table, described as an Altar, or Communion-Table, is made of wood, and is not attached to the platform, but merely stands upon it; that it is placed at the east end of the Church, or the Chancel, according to the ordinary usage as to Communion Tables; that at the end nearest the wall there is a narrow ledge raised above the rest of the Table; that upon this ledge, which is termed 'the super-altare,' stand the two gilded candlesticks, which are moveable, and between them the wooded cross, which is let into and fixed in the super-altare, so as to form part of what is thus described as the Altar, or Communion Table.

"The Judgment complained of has not ordered the removal of the Table[3] or of the candlesticks,[4] but only of the cross, the credence-table, and the cloths.

[1] This term appears to include the "Ecclesiastical Common Law," which Sir J. Dodson, as well as Dr. Lushington, carefully distinguishes from "Canons, Constitutions, and Ordinances Synodal or Provincial." Compare also 25 Henry VIII. c. 19. s. 7, with 35 Henry VIII. c. 16. s. 2. The latter statute is not printed in ordinary editions, but was quoted by Sir J. Dodson, and gives a qualified sanction to "such other ecclesiastical Laws or Jurisdiction spiritual as be yet accustomed and used here in the Church of England."

[2] With respect to this point, the Bishop expressly states in his letter to Mr. Westerton that the height of the Communion Table did not attract his attention, and that the cross thereon was concealed from his view by a large offertory dish. Sir J. Dodson declares that the Bishop's assent, even if it had been given, would not have been material. "If it was contrary to law, no consent of the Diocesan could make it legal."

[3] The Table was not condemned, inasmuch as it was of wood, and capable of being moved, though not with facility.

[4] The candlesticks were not condemned, inasmuch as, although apparently

"There is no appeal against this order so far as it permits the Table and candlesticks to remain, and it is, therefore, not open to their Lordships to consider the Judgment with reference to the articles not ordered to be removed.

"The evidence as to the wishes of the parishioners upon this subject[1] appears to their Lordships to show (what, in such a case, might perhaps be expected) that with respect to these ornaments there are many persons of great respectability, who, from conscientious motives, are strongly attached to them; many of equal respectability, who, from motives equally conscientious, feel an invincible repugnance to them; and some, it may be hoped not a few, who, whatever opinion they may form of their intrinsic value, consider them as of no importance whatever in comparison with Christian charity and concord, and who, whether they approve, or whether they disapprove, of them, would infinitely rather sacrifice their individual feelings and opinions than secure their triumph at the expense of disturbing and distracting the Church of which they are members.[2]

"With respect to the appeal of '*Liddell and others* v. *Beal*.' St. Barnabas is a Chapel of Ease within the District Chapelry of St. Paul, of which the curates are appointed by Mr. Liddell. In this case both the Chapel-wardens agree with Mr. Liddell as to the ornaments in question. On the 17th January, 1855, a Monition was issued against them, at the instance of Mr. Beal, an inhabitant of the District Chapelry of St. Barnabas, by which they were monished to remove from the said Chapel the rood-screen and brazen gates, together with the cross elevated and fixed on the said screen, and also the stone altar and cloths now used for covering the same, and the cross ornamented with jewels elevated thereon and fixed thereto, with the candlesticks and candles placed thereon, and also the marble credentia, preparatory altar or credence-table, and to substitute in lieu and stead thereof a decent Table for the administration of the Lord's Supper and

intended for ornament rather than for use, they might possibly be employed for the purpose of giving necessary light.

[1] There had been affidavits respecting it on both sides.

[2] The same sentiment had been emphatically expressed by Dr. Lushington.

Holy Communion, and a decent covering thereto, and to set up on the east end of the chancel of the said Chapel, the Ten Commandments, as by the Laws, Canons, Institutions, and Customs of the United Church of England and Ireland is prescribed.

"The answer admits that between the chancel and the nave of the church there is a screen of carved wood, on the summit whereof a wooden cross is affixed. It admits, in substance, the existence of the stone table, or Altar, with the metal cross attached thereto, and it insists that the article of furniture so described, is 'mensa congrua et decens' within the meaning of the Canons, and is such a Communion Table as is required by law for the celebration of the Holy Communion. It admits the use of various cloths differing in colour from each other, as coverings of the Communion Table at different seasons, and that the covering used on the said Altar or Communion Table at the time of the administration of the Holy Communion, is of worked and embroidered white linen, ornamented and enriched and bordered at the ends with elaborately worked lace, and that the other articles of linen used in the said office are also decorated and enriched with white lace. It denies that the credence-table is attached to the chancel, and alleges that the same is a moveable table, necessary and convenient for the decent celebration of the Holy Communion, according to the Rubrics of the Book of Common Prayer. The answer then alleges that these ornaments existed in the church when it was consecrated in 1850, and that the services are attended by large and devout congregations, whose religious feelings would be violated by their removal.

"The Judgment complained of has ordered the Church or Chapel-wardens of St. Barnabas, to remove the present structure of stone used as a Communion Table in the said church, and to provide instead thereof, a moveable table of wood; to remove the credence-table; to remove the cross on the screen, as also the cross on or near the present structure used as a Communion Table; to take away all the cloths at present used in the said church, or chapel, for covering the structure now used as a Communion Table during the time of Divine service, and to provide and substitute in place of the said

cloths one covering only for the Communion Table of silk or other decent stuff; and further to remove any cover used at the time of the ministration of the Sacrament, worked or embroidered with lace or otherwise ornamented, and to substitute a fair white linen cloth, without lace or embroidery, or other ornament, to cover the Communion Table at the time of the ministration of the Sacrament, and to cause the Ten Commandments to be set up on the east end of the church in compliance with the terms of the Canon. As to the order directing the Ten Commandments to be set up there is no appeal.

"When this case came by appeal before the Dean of the Arches, some additional evidence was given with respect to the assent of the Bishop of London to the use of these ornaments before the chapel was consecrated.[1] But it does not appear to their Lordships to be necessary to go into this part of the case.

"Their Lordships will deal with each of the articles which are the subject of appeal, separately; and,

"First. With respect to the crosses, the point to which by far the greater part of the argument at this bar. was addressed.

"No distinction was taken by the Courts below between the different crosses which are the subject of appeal; between the crosses on what are termed the Altars or Communion Tables, both at St. Paul's and St. Barnabas', and the cross on the chancel screen in St. Barnabas'. The learned Judges have treated them as being all subject to the same considerations, and have ordered them all to be removed, as illegal ornaments. But though both Judges arrived at the same conclusion, there is some difference between the reasons assigned for their decisions.

"Dr. Lushington seems to have held that the question was, according to the Rubric of the present Prayer Book, what ornaments could be shown to have been in churches in the

[1] Reference is here made to an affidavit put in by Mr. Liddell previous to the argument in the Arches Court. This affidavit embodied a statement of the Rev. Mr. Bennett, the former incumbent of St. Barnabas, to the effect that the Bishop of London had been apprised of the proposed erection of the two crosses, and had given his assent to it.

second year of the reign of Edward the Sixth, by authority of Parliament, according to the Rubric of the present Prayer Book, whatever those words, according to their true construction, might import?[1]

"Sir John Dodson, on the other hand, considered the question to depend on the effect of certain Royal Injunctions, and an Act of Parliament, against the use of images, amongst which he considered crosses to be included.[2]

"It will be necessary to examine both these grounds of decision with the attention and respect which are due to the eminent persons who have adopted them; and first, as to the effect of the Rubric.

"In dealing with this question it is necessary to remember that there were many crosses, some with, some without, the image of the Saviour, which were in use in the Roman Catholic ritual; altar crosses, processional crosses, funeral crosses, and others, as well as painted or carved representations of the cross not used in the services, but set up as architectural decorations of churches; and the question is, whether the Rubric applies to the latter class.

"The Rubric is in these words: 'And here it is to be noted that such ornaments of the Church and of the Ministers thereof, at all times of their Ministration, shall be retained, and be in use, as were in this Church of England, by authority of Parliament in the second year of the reign of King Edward the Sixth.'[3]

"Dr. Lushington was of opinion, that by the true construction of these words, reference must be had to the Act of the second and third, Edward the Sixth,[4] and the Prayer Book

[1] The substance of Dr. Lushington's argument is embodied in the passage quoted, pp. 119, 120.

[2] The "Injunctions" in question are those issued by Edward VI., with the advice of his Council, in 1547, and their general object was to abolish images and other ornaments not essential to Divine worship, which had been abused. "The Act of Parliament" is the 3d and 4th Edward VI. cap. 10, abolishing all books and images tending to the maintenance of superstition. Dr. Lushington had guarded himself against being supposed to found his decision on this Act.

[3] This Rubric, like others, owes its authority to the Act of Uniformity, 13 and 14 Charles II. c. 4, virtually incorporating the Book of Common Prayer.

[4] 2 and 3 Edward VI. c. 1.

which it established,[1] for the purpose of determining what ornaments were thereby sanctioned, but he was perplexed by the difficulty that although there were words in that Prayer Book describing the ornaments of the Ministers, there were none which applied to ornaments of the Church, in his understanding of this expression.

"Their Lordships, after much consideration, are satisfied that the construction of this Rubric which they suggested at the hearing of the case is its true meaning, and that the word 'ornaments' applies, and in this Rubric is confined to those articles the use of which in the Services and Ministrations of the Church is prescribed by the Prayer Book of Edward the Sixth.[2]

"The term 'ornaments' in Ecclesiastical law is not confined, as by modern usage, to articles of decoration or embellishment, but it is used in the larger sense of the word 'ornamentum,' which, according to the interpretation of Forcellini's Dictionary, is used 'pro quocumque apparatu, seu instrumento.' All the several articles used in the performance of the services and rites of the Church are 'Ornaments.' Vestments, Books, Cloths, Chalices, and Patens, are amongst church ornaments; a long list of them will be found extracted from Lyndwood, in Dr. Phillimore's edition of 'Burn's Ecclesiastical Law.' (Vol. I. p. 375-6-7.) In modern times organs and bells are held to fall under this denomination.

"When reference is had to the First Prayer Book of Edward the Sixth, with this explanation of the term 'ornaments,' no difficulty will be found in discovering, amongst the articles of which the use is there enjoined, ornaments of the Church as well as ornaments of the Ministers. Besides the vestments differing in the different services, the Rubric provides for the use of an English Bible, the New Prayer Book, a Poor Man's

[1] That is, the first Prayer-book.

[2] Dr. Lushington and Sir J. Dodson had taken it as admitted that crosses were "ornaments." In the following paragraphs their lordships give their reasons for holding the contrary proposition. They here limit "ornaments in use by authority of Parliament, in the second year of the reign of King Edward the Sixth," to ornaments *prescribed* by 2 and 3 Edward VI. c. 1, thereby excluding any that may have been legally in use before, and were not *prohibited* by that statute.

Box, a Chalice, a Corporas, a Paten, a Bell, and some other things.

"That these articles were included in the term 'Ornaments of the Church' at the period in question is clear, from two documents nearly contemporaneous, one before and the other after the establishment of the First Prayer Book.

"In a letter of the Council to Cranmer, dated the 30th April, 1584, to be found in Strype's 'Memorials of Cranmer,' vol. ii. p. 90, they complain of the conduct of certain Churchwardens, who sent away their chalices, crosses of silver, bells, and other ornaments of the Church; and in a Commission in 1552, 1 Card. Doc. Ann. p. 112, No. xxvii. (Ed. 1844), the Commissioners are enjoined to leave 'in every church or chapel of common resort, one, two, or more chalices or cups, according to the multitude of people in every such church or chapel, and also such other ornaments as by their discretion shall seem requisite for the Divine service in every such place for the time.'

"If reference be now made to the alterations in these matters introduced by the Second Prayer Book of Edward the Sixth, and the subsequent Rubric to the Prayer Book of Elizabeth, the meaning will be sufficiently clear.

"The Second Prayer Book forbids the use of different vestments by the Priest in the performance of the different services, and enjoins the use of a Surplice only; and does not expressly mention the Paten, Chalice, and Corporas.

"After the overthrow of Protestantism by Queen Mary, and its restoration on the accession of Queen Elizabeth, a great controversy arose between the more violent and the more moderate Reformers as to the Church service which should be re-established, whether it should be according to the First, or according to the Second Prayer Book of Edward the Sixth. The Queen was in favour of the First, but she was obliged to give way, and a compromise was made, by which the services were to be in conformity with the Second Prayer Book, with certain alterations; but the ornaments of the Church, whether those worn or those otherwise used by the Minister, were to be according to the First Prayer Book.

"In conformity with this arrangement, the Act, 1 Eliz. c. 2,

was passed, by which the use of the Second Prayer Book was established; but it was provided by section 25, 'That such ornaments of the Church and of the Ministers thereof, shall be retained and be in use, as was in this Church of England by authority of Parliament in the second year of the reign of King Edward the Sixth, until other order taken therein by the authority of the Queen's Majesty;' with such advice as therein mentioned.

"The Rubric to the new Prayer Book, framed to express the meaning of this proviso, is in these words: 'And here is to be noted that the Minister, at the time of the Communion, and at all other times of his Ministration, shall use such ornaments in the Church as were in use by authority of Parliament, in the second year of the reign of King Edward the Sixth, according to the Act of Parliament set in the beginning of this book.'

"Here the term 'ornaments' is used as covering both the Vestments of the Minister and the several articles used in the services; it is confined to such things as, in the performance of the services, the Minister was to use.

"It will be observed that this Rubric does not adopt precisely the language of the Statute, but expresses the same thing in other words. The Statute says, 'such ornaments of the Church and of the Ministers thereof shall be retained and be in use;' the Rubric, 'that the Minister shall use such ornaments in the Church.'

"The Rubric to the Prayer Book of January 1st, 1604, adopts the language of the Rubric of Elizabeth. The Rubric to the present Prayer Book adopts the language of the Statute of Elizabeth; but they all obviously mean the same thing, that the same dresses and the same utensils, or articles, which were used under the First Prayer Book of Edward the Sixth may still be used. None of them, therefore, can have any reference to articles not used in the services, but set up in Churches as ornaments, in the sense of decorations.[1]

"It was urged at the Bar that the present Rubric, which refers to the second year of Edward the Sixth, cannot mean ornaments mentioned in the First Prayer Book, because, as it

[1] This is the exact reverse of the view adopted by the Courts below.

is said, that Act was probably not passed, and the Prayer Book was certainly not in use, till after the expiration of the second year of Edward the Sixth, and that, therefore, the words 'by authority of Parliament' must mean by virtue of Canons or Royal Injunctions having the authority of Parliament made at an earlier period.

"There seems no reason to doubt that the Act in question received the Royal assent in the second year of Edward the Sixth. It concerned a matter of great urgency which had been long under consideration, and was the first Act of the session; it passed through one House of Parliament on January the 15th, 1549, N.S. and the other on the 21st of the same month; and the second year of the reign of Edward the Sixth did not expire till January the 28th. In the Act of the 5th & 6th Edward the Sixth, cap. 1, sec. 5, it is expressly referred to as the Act 'made in the second year of the King's Majesty's reign.'[1]

"Upon this point, therefore, no difficulty can arise. It is very true that the New Prayer Book could not come into use until after the expiration of that year, because time must be allowed for printing and distributing the Books; but its use, and the Injunctions contained in it, were established by authority of Parliament in the second year of Edward the Sixth, and this is the plain meaning of the Rubric.

"It was contended by Mr. Stephens, in a very able argument,[2] that the Canons passed in the reign of Henry the Eighth had no Parliamentary authority in the reign of Edward the Sixth, for that the true meaning of the Statutes relating to that subject passed in the reign of Henry the Eighth is that they provide for the review of the existing Canons by Commissioners appointed by the King, and give authority to those Canons only in the meantime, *i.e.* during the continuance of the Commission; that the Commissioners never made

[1] This result is the same as that stated by Sir J. Dodson after an elaborate discussion of the point.

[2] The object of this argument was to dispose of the allegation that certain ornaments, and crosses among the rest, were in use by authority of Parliament —that is, by virtue of Canons sanctioned by Parliamentary authority,—in the second year of Edward VI., although not recognised by the statute of that year, or by the First Prayer-book.

any report; that the Commissions determined by the death of King Henry the Eighth; and that the Parliamentary sanction given to the Canons ended at the same time.

"If it were necessary to determine this point, their Lordships think this argument might deserve serious consideration, although it is contrary to the general impression which has prevailed upon the subject. As, however, their Lordships entertain no doubt whatever as to the meaning of the words 'authority of Parliament' used in the Rubric, it is useless to enter further into the question.

"Their Lordships, therefore, are of opinion that, although the Rubric excluded all use of crosses in the services, the general question of crosses *not* used in the services, but employed only as decorations of Churches, is entirely unaffected by the Rubric. If crosses of the latter description were in use in the second year of Edward the Sixth, they derive no protection from the Rubric; if they were lawfully in use they are not excluded by the Rubric, though they might not have the sanction of the authority of Parliament.

"The next question is, are crosses forbidden under the term 'images' in the Injunctions and Act of Parliament relied on by Sir John *Dodson*?[1] It is laid down in the Judgment, and was strongly pressed at the Bar, that the term 'images' may apply to crosses; that 'imagines crucis,' are often mentioned, as well as imagines crucifixi, et sanctorum;' that the cross, at the accession of Henry the Eighth, was itself an object of superstitious worship in the Roman Catholic Church; that two services in its honour are found in the Roman Catholic Missal; that it was abused like other images, and was abolished like other images. It is impossible to deny that crosses are frequently spoken of amongst images.

"The Articles concerning laudable ceremonies, published by Henry the Eighth in 1536, under the head, 'And first of Images,' declare that the worship 'is only to be done' to God, and in his honour, although it be done before the images, whether it be of Christ, of the cross, of our Lady, or of any other saint beside.'—Lloyd's Formularies of Faith, p. xxviii. And passages to the same effect are to be found in other con-

[1] That is, the Injunctions of 1547, and the Act of 3 and 4 Edw. VI. cap. 10.

temporary documents. But the result of the best examination which their Lordships have been able to make is, that the term 'Image,' though it may be extended by the context, is generally to be understood in a more limited sense.[1]

"Although it is true that crosses had been abused as well as crucifixes and images of saints, it must be remembered that there is a wide difference between the cross and the images of saints, and even, though in a less degree, between a cross and a crucifix. A cross was used as a symbol of Christianity for two or three centuries before either crucifixes or images were introduced; it was used for ages before the Reformation, and has continued ever since to be used as an ensign of honour, as an ornament both of buildings and persons, ecclesiastical and civil, public and private, without any relation to superstitious or even to religious usages. That this was the view taken by some of the early reformers will sufficiently appear by a letter of Cassander, to be presently mentioned. The distinction between the cross and images is still more marked. Though in process of time the cross was transformed into the crucifix, or itself became the object of adoration, it was the memorial of a real event, the most momentous that ever happened in the history of the world, and was worshipped, however erroneously, only in connexion with that Being to whom all worship is due. The images of the saints, on the other hand, were often connected (to use the language of some of the writers to which we must refer) 'with lying legends and feigned miracles;' and it might well be that the worship and invocation of saints should be abolished, and the images connected with that practice be swept away, while the cross was retained with the faith of which it was an emblem. The important question, however, is not what it was reasonable to do, but what in fact was done, by the regulations for the removal of images.

"The first set of Injunctions of Edward the Sixth were issued in the first year of his reign, some time, as it was said,

[1] This conclusion is supported by the general tenour of the Homily against Peril of Idolatry, in which, however, we find the following expression:— "Although in common speech we use to call *the likeness or similitudes of men or other things*, images, and not idols," &c.

between the months of May and August, 1547.—1 Card. Doc. Ann. No. II. p. 4. (Edit. 1844.) By these Injunctions the clergy are required to teach the people that all the usurped authority of the Bishop of Rome has been justly abolished. They are not to 'extol any images, relics, or miracles, for any superstition or lucre, nor allure the people by any enticements to the pilgrimage of any saint or image;' they are to teach 'that works devised by men's fantasies, besides Scripture, as waudering to pilgrimages, offering of money, candles or tapers, or relics or images, or kissing and licking of the same, praying upon beads or such like superstition, have not only no promise of reward in Scripture for doing of them, but contrariwise, great threats, and maledictions of God, for that they be things tending to idolatry and superstition.' The third item of these Injunctions is in these words:—'That such images as they know in any of their cures to be or have been so abused with pilgrimage or offerings of anything made thereunto, or shall be hereafter censed unto, they (and none other private persons) shall for the avoiding of that most detestable offence of idolatry, forthwith take down, or cause to be taken down, and destroy the same; and shall suffer from henceforth no torches nor candles, tapers, or images of wax to be set afore any image or picture, but only two lights upon the high altar, before the sacrament, which for the signification that Christ is the very true light of the world, they shall suffer to remain still: admonishing their parishioners, that images serve for no other purpose but to be a remembrance, whereby men may be admonished of the holy lives and conversation of them that the said images do represent: which images if they do abuse for any other intent, they commit idolatry in the same, to the great danger of their souls.'

"It is clear that in this passage, images are spoken of, as images of persons, and that only such images of any kind as had been or should be the object of superstitious worship, were to be removed; and it shows that the high Altar was to remain as it had been before, with lights upon it, before the sacrament. The nineteenth item provides 'that no person shall from thenceforth alter or change the order and manner of any fasting day that is commanded, nor of common prayer,

or divine service, otherwise than is specified in these Injunctions, until such time as the same shall be otherwise ordered and transposed by the King's authority.' The twenty-first provides for reading certain portions of Scripture in English in the time of High Mass. The twenty-eighth is in these terms:—'Also, That they shall take away, utterly extinct, and destroy all shrines, covering of shrines, all tables, candlesticks, trindles or rolls of wax, pictures, paintings, and all other monuments of feigned miracles, pilgrimages, idolatry and superstition: so that there remain no memory of the same in walls, glass windows, or elsewhere within their churches or houses. And they shall exhort all their parishioners to do the like, within their several houses. And that the churchwardens, at the common charge of the parishioners in every Church, shall provide a comely and honest pulpit, to be set in a convenient place within the same, for the preaching of God's word.' If this section be read in connexion with those which precede it, it is obvious that it applies only to articles which had been the object of feigned miracles, pilgrimages, idolatry, and superstition, and at all events, could not include either crosses or images which had not been so abused, and which, by the previous Injunctions, were to be retained; and, as regards the cross itself, its use was not only permitted, but enjoined, as the old services which required it were retained. The section could not mean that all candlesticks should be removed from Churches, for two were to be retained on the High Altar. Still less could it mean that all Tables, candlesticks, and pictures should be removed from private houses.

"That this is the true meaning of the Injunctions is further shown by the Articles of Visitation, in which inquiry was to be made, whether they had been obeyed.

"The Article applicable to this subject is as follows:—'Whether there do remain not taken down in your churches, chapels or elsewhere, any misused images, with pilgrimages, cloths, stones, shoes, offerings, kissings, candlesticks, trindles of wax, and such other like; and whether there do remain not defaced and destroyed any shrines, covering of shrines, or any other monument of idolatry, superstition and hypocrisy.'

—1 Card. Doc. Ann. p. 25. (Edit. 1844.) Another inquiry is—'Whether they which have spoken and declared anything for the setting forth of pilgrimages, feigned relics, images, or any such superstition, have not openly recanted the same.'—Ib. p. 27.

"The object of these Injunctions appears to have been to abolish the worship or superstitious veneration of images and relics, but they left entirely untouched the service of High Mass, and made no declaration as to the nature of the Sacrament then administered. Indeed a subsequent Proclamation of the King, dated 27th December, 1547, forbids any discussion of the doctrine of the real presence until the King should define the doctrine.

"On the 6th February, 1547, N.S. the King issued a Proclamation by which punishment was denounced against such persons as should of their private mind 'omit, leave done, change, alter or innovate any order, rite, or ceremony commonly used and frequented in the Church of England, and not commanded to be left done' in the reign of the late King, other than such as His Highness, King Edward the Sixth, in manner therein mentioned, had ordered or should order to be altered; provided always that no man should be punished for omitting certain particular observances therein mentioned, and, amongst others, for 'not creeping to the cross.'

"The ceremony of creeping to the cross seems to be explained by a Constitution of Giles de Bridport, Bishop of Sarum, A.D. 1256 (Wilkins' 'Concilia,' vol. i. p. 713,) which provides that on the day of our Saviour's passion all the parishioners 'shall come to worship the Cross and to offer according to their inclination.' In Strype's 'Memorials of Cranmer,' the practice is alluded to in these terms:—'And because creeping to the cross was a greater abuse than any of the other, (for there the people said, 'Crucem tuam adoramus, Domine:' and the ordinal saith, 'Procedant clerici ad crucem adorandam nudis pedibus,' and it followeth in the said ordinal, 'Ponatur crux ante aliquod altare, ubi a populo adoretur,' which by the Bishop's Book, entituled 'A Necessary Instruction,' is against the second commandment), therefore he, (the Archbishop,) desired of the King that the creeping to the

cross might also cease hereafter.'—(Strype's Mem. vol. i. p. 299.)

"It is plain, therefore, that up to this time the use of the cross was permitted, though misused images were in the strongest and most general terms forbidden.

"On the 21st of February, 1548, N.S., however, another Proclamation was issued, upon the authority of which it is contended that all images, including crosses, were to be taken down.[1] It is in these terms:—'After our right hartye recommendations to your good lordship; where now of late in the king's majestie's visitation, amonge other godlye injunctions commaunded to be generally observed throughe all partes of this hīs highnes realme, one was set forthe, for the taking downe of all suche images, as had at any tyme ben abused with pilgrimages, offeringes or censinges; albeit that this said injunction hathe in many partes of the realme ben wel and quyetlye obeyed and executed, yet in many other places muche stryfe and contentyon hath rysen and dayly ryseth, and more and more encreaseth, about the execution of the same, some men beyng so superstytyous or rather wylfull, as they wold by theyr good wylles retayne all suche images styll, although they have been mooste manyfestly abused, and in some places also the images whiche by the saide injunctions were taken downe, be now restored and set up again, and almoste in every place ys contentyon for images, whether they have been abused or not; and whiles these men go about on both sides contentyouslye to obtaine theyr myndes, contending whether this or that imaege hath been offered unto, kyssed, censed, or otherwyse abused, partyes have in some places ben taken in suche sorte, as further inconvenyence is very like to ensue, yf remedie be not provided in tyme: considering therefore that allmost in no places of this realme ys any sure quyetness, but where all images to be hoolly taken awaye and pulled downe already, to the intent that all contentyon in

[1] Sir J. Dodson had referred to this document as "a letter issued by the Council to Cranmer." It must be distinguished from the "letter of the Council to Cranmer, dated 30th April, 1548," quoted above, to show that chalices, &c. are "ornaments," and again quoted below as "the injunction of the Council of the 30th April, 1548," to show that chalices and other valuable ornaments were subject to spoliation.

everye parte of this realme for this matter may be clerely taken away, and that the lyvely images of Christe shulde not contende for the deade images, whiche be things not necessary, and without whiche the churches of Christ contynued most godlye many yeres. We have thought good to signify unto you, that his highnes pleasure with th' advyse and consent of us the lord protectour and the reste of the counsell ys, that immediately upon the sight herof, with as convenyent dilligence as you maye, you shall not onely gyve ordre, that all the images remayninge in any churche or chappell within your diocese be removed and taken away, but also by your letters signifye unto the reste of the busshopes within-your provynce his highnesse' pleasure for the lyke order to be gyven by them and every of them, within their several dioceses; and in th' execution therof we requyre bothe you and the reste of the busshopes foresayd, to use suche foresight as the same may be quyetlye donne with as good satisfaction of the people as may be.'

"It appears to their Lordships that this Proclamation applies only to such images as are the subject of the former Proclamation, and that the intention was not to introduce within the prohibition, articles of a description not before forbidden, but to do away with the distinction between images which had been, and images which had not been, abused. This Proclamation, any more than the former, could not apply to crosses, for the old services were still in use. The Act establishing the new Book of Common Prayer did not pass until near a twelvemonth afterwards, and that Act itself provides that for a certain time after its date the old ceremonies should continue.

"This is confirmed by the Letter of the Council sent to all those preachers which the King's Majesty had licensed to preach, issued on the 13th of May, 1548, by which clergymen were enjoined to teach the people on the one hand 'to flee all old erroneous superstitions, as the confidence in pardons, pilgrimages, beads, religious images, and other such of the Bishop of Rome's traditions and superstitions, with his usurped power, the which things be here in this realm most justly abolished;' and then, on the other hand, straitly to rebuke

those who 'will take upon them to run before they be sent, to go before the rulers, to alter and change things in religion without authority.' It is declared that it 'is not a private man's duty to alter ceremonies, to innovate orders in the Church, nor yet is it not a preacher's part to bring that into contempt and hatred which the Prince doth either allow or is content to suffer.'—1 Card. Doc. Ann. No. xi. pp. 63, 65, (Edit. 1844.)

"The next authority relied on,[1] is the 3rd & 4th Edward the Sixth, c. 10, intituled 'An Act for the abolishing and putting away divers Books and Images.' The object of this Act was to enforce the observance of the New Prayer Book, and of former Orders with respect to images. After enacting that all Antiphoners and other Books of the services of the Church, other than the authorized Prayer Book, shall be utterly abolished, it proceeds to enact, that if any person shall have such books in his possession, or any images of stone, timber, alabaster or earth, graven, carved or painted, which heretofore have been taken out of any Church or Chapel, or shall stand in any Church or Chapel, and do not before the last day of June then next ensuing, deface and destroy the images, and deliver up the books for the purpose of being destroyed, such persons failing to deliver up the books shall be subject to certain penalties, but it inflicts no penalty on persons failing to deface or destroy the images, nor does it in terms order their destruction or defacement. No doubt, however, it implies that to retain them is illegal, but it relates, in their Lordships' opinion, to the destruction of images already ordered to be removed, but which either had not been removed, or having been so, were still retained for private veneration and worship; and the images so described, for the reasons already assigned, cannot include crosses. The letter of King Edward the Sixth to Cranmer, directing him to

[1] That is, to show that crosses are "images." Speaking of this Act, Dr. Lushington had said :—"It may be well here to observe that this Statute was applicable to the First Book of Common Prayer; that it continued in force only till 1553, when it was repealed by Mary, session 2, cap. 2, and that it remained repealed from 1553 to 1604, when it was revived by 2 James I. cap. 26, sec. 48, and without the least regard to the Book of Common Prayer having been twice altered in the interim."

give effect to this Act, refers only to books, saying nothing as to images.

"Thus matters remained as regarded the law upon the subject now in question, until the end of the reign of Edward the Sixth; for although most important alterations were made in the order of Divine Service, by the 5th & 6th Edward the Sixth, c. 1. and the New Prayer Book thereby introduced,[1] they apply only, like the former Prayer Book, to that which was to be used in the services and rites of the Church.

"But although their Lordships are of opinion that the law did not require the removal from Churches of crosses, merely as such, both Books of Common Prayer had excluded them from use in the services. They were no longer to be employed; and nothing is more probable, therefore, than that if they could be turned to any profit, they would be made the subject either of sale or robbery, and that in the popular disturbances which accompanied the great change in the religion of the nation, and in many cases anticipated and outran the acts of the Government, crosses would share the fate of images; so that between the fanaticism of the populace, and the cupidity of the courtiers, the ornaments of the Churches, in every sense of that term, would be subject to spoliation and destruction. We find, indeed, by the Injunction of the Council of the 30th April, 1548, already referred to,[2] that even at this early period such proceedings were going on, for that Letter expressly forbids the sale or alienation of the chalices, silver crosses, bells, or other ornaments, which it declares were not given for that purpose to be alienated by parishes at their pleasure, but rather to be used to the intent they were first given, or to some other necessary and convenient service of the Church.

"Under these circumstances, it cannot be matter of surprise if comparatively few crosses remained either standing in the Churches or preserved in the repositories of its ornaments.

"On the accession of Queen Mary, all the old superstitions were restored and the Acts of Parliament to which we have referred were repealed. The images which had not been taken

[1] The Second Prayer Book of Edward VI. For a summary of these alterations see note p. 147.

[2] See note 1 to p. 138.

down remained, and many which had been taken down were restored.

"On the accession of Queen Elizabeth, in the year 1558, the Statutes of Queen Mary on these matters were repealed, the supremacy of the Crown was established by the Act 1 Eliz. c. 1,[1] and all such jurisdiction in spiritual matters as hitherto had been or lawfully might be exercised by any Spiritual or Ecclesiastical authority was annexed to the Crown of England, and power was given to the Queen and Her successors to appoint Commissioners for the purpose of exercising Ecclesiastical jurisdiction.

"By the 1st Eliz. c. 2, the Second Prayer Book of Edward the Sixth, with certain alterations, was re-established, Injunctions were issued, and Articles of Visitation framed, much to the same effect as those already promulgated in the reign of Edward the Sixth, but which do not appear to their Lordships to extend the prohibition with respect to images.

"It is known, indeed, that at this time great differences of opinion prevailed amongst the early Reformers with respect to the use of crosses and crucifixes, and that the Queen was favourable to the use of both; that she retained them in her own Chapel, and although they were removed for a time, in consequence of the remonstrances made to her, they were afterwards restored.[2]—1 Card. Doc. Ann. p. 268, No. xlvii. (Edit. 1844.) But a greater distinction was made between the cross and the crucifix, and the use of the former might well be permitted while the other was forbidden.

"This is very manifest from the letter of George Cassander to Bishop Cox, dated at Worms, 1560, printed in the second series of the Zurich Letters, pp. 42-3. He there expresses himself in these terms:—'I undertand that you are not altogether agreed amongst yourselves with respect to the setting up the image of the cross or the crucifix in the Church; but I do not sufficiently understand whether the question refers

[1] With the difference that the Queen was to be styled "the only Supreme Governor of this Realm, and of all other Her Highness' Dominions and Countries, as well in all spiritual or Ecclesiastical Things or Causes, as Temporal," (sect. 19), instead of "supreme Head of the Church."

[2] Great stress had been laid upon this in the arguments of counsel.

to the mere figure of a cross, or also to the image of Christ hanging upon it. I have seen here a certain print, which contained a cross only in the middle, with some texts of Holy Scripture in the English language written on each side; whence I suspect that your question only refers to the figure of the cross.' * * * * * *

'Your Excellence is aware in what frequent use and in what great esteem the figure of the cross was held among the early Christians; insomuch that it was every where placed, and represented in their buildings, sacred and profane, public and private; and this, too, before the practice of setting up other images in the Churches, whether of Christ himself, or of the Saints, had come into use; that on the destruction of all monuments of idolatry, by which everything was defiled, the figure of the cross, which was, as it were, a sacred symbol of Christianity, succeeded under better auspices into their place. And like as the word cross, in the writings of the Evangelists and Apostles, mystically signifies the passion, death, and triumph of Christ, and the afflictions of the Saints; so also by the figure of the cross, every where set up, and meeting the eye, they intended all these things to be set forth, as it were by a mystic symbol, and infixed in men's minds: wherefore they made a great distinction between the figure or representation of the cross, and all other images.'

"Of the cross thus used, Cassander signifies his approval.

"That many of the English Bishops objected both to crosses and crucifixes, and either ordered or sanctioned their removal from Churches within their Dioceses, and that in many others they were defaced or destroyed by the violence of the people, can admit of no doubt; and that this violence extended also to monuments in Churches, appears by a Proclamation issued by Queen Elizabeth against defacers of monuments in the year 1560; for it speaks of these proceedings as 'to the slander of such as either gave or had charge in times past only to deface monuments of idolatry and false feigned images in Churches and Abbeys;' expressions which tend strongly to confirm the meaning their Lordships have already attributed to the Injunctions and Acts of Parliament of Edward the Sixth.

"Upon the whole, their Lordships, after the most anxious consideration, have come to the conclusion that crosses, as distinguished from crucifixes, have been in use, as ornaments of Churches, from the earliest periods of Christianity; that when used as mere emblems of the Christian faith, and not as objects of superstitious reverence, they may still lawfully be erected as architectural decorations of Churches; that the wooden cross erected on the Chancel screen of St. Barnabas is to be considered as a mere architectural ornament; and that as to this article, they must advise Her Majesty to reverse the judgment complained of. Their Lordships hope and believe that the laws in force respecting the consecration of any building for a Church, and which forbid any subsequent alteration without a faculty from the Ordinary, will be sufficient to prevent any abuse in this respect.

"This decision, however, by no means disposes of the question, as to crosses attached to Communion Tables, which it will be convenient to deal with in connexion with the Altar at St. Barnabas', which is ordered to be removed.

"This article of church furniture consists of a marble slab, with a super-altare on the side nearest to the wall of the chapel. It stands apart from the wall supported upon stone carved arches, the arches resting upon a stone plinth, which is let into and embedded in the pavement on which it stands. The cross is attached to the super-altare, and stands between two large candlesticks which are moveable.

"The question is, whether this structure is a Communion Table within the meaning of the Law.

"The Appellants in their pleadings, term these Tables, 'Altars, or Communion Tables;' and in the argument they have referred to two recent Statutes, in which the word 'Altar' is used to signify the 'Communion Table.' When the same thing is signified, it may not be of much importance by what name it is called; but the distinction between an 'Altar' and a 'Communion Table' is in itself essential and deeply founded in the most important difference in matters of faith between Protestants and Romanists; namely, in the different notions of the nature of the Lord's Supper which prevailed in the Roman Catholic Church at the time of the

Reformation, and those which were introduced by the Reformers. By the former it was considered as a sacrifice of the body and blood of the Saviour. The Altar was the place on which the sacrifice was to be made; the elements were to be consecrated, and, being so consecrated, were treated as the actual body and blood of the victim. The Reformers, on the other hand, considered the Holy Communion not as a sacrifice but as a feast, to be celebrated at the Lord's Table; though as to the consecration of the elements, and the effect of this consecration, and several other points, they differed greatly amongst themselves.

"This distinction is well pointed out in Cudworth's 'Discourse concerning the True Notion of the Lord's Supper,' Ch. v. p. 27. 'We see then how that theological controversy which hath cost so many disputes, whether the Lord's Supper be a sacrifice, is already decided; for it is not 'sacrificium,' but 'epulum;' not a sacrifice, but a feast upon sacrifice; or else, in other words, not 'oblatio sacrificii,' but, as Tertullian excellently speaks, 'participatio sacrificii;' not the offering of something up to God upon an altar, but the eating of something which comes from God's altar, and is set upon our tables. Neither was it ever known amongst the Jews or Heathens that those tables upon which they did eat their sacrifices should be called by the name of altars.* * * * Therefore he (St. Paul) must needs call the Communion Table by the name of the Lord's Table, *i.e.* the Table upon which God's meat is eaten, not his altar upon which it is offered.'

"That the Roman Catholic Altars are constructed with a view to this doctrine of sacrifice, admits of no doubt. Cardinal Bona speaks of them in these terms: 'De Altaribus Novi Testamenti agendum est in quibus Corporis et Sanguinis Christi sacrificium incruentum immolatur.' Rerum Liturgicarum, Lib. i. c. 20, § 1. With respect to the question what is required to constitute a Roman Catholic Altar, we have been furnished with valuable information by a treatise entitled 'Institutiones Liturgicæ ad usum Seminarii Romani,' by Fornici; the present text-book of the Pope's Seminary. In the first part, 'De Sacrificio Missæ,' c. 3, p. 18, 'De Altari

ejusque ornatu,' it is laid down, in the first place, 'Nunquam extra altare hostiam immolari.' It is then stated that Altars originally were made indifferently of wood or stone, but that many centuries ago the Church ordered that they should be only of stone. The term 'Altar' is thus explained: 'Nomine autem altaris intelligitur superficies plana ad sacrificium missæ immediatè deputata.' The Altar is to be in the Church; it is to be fixed and immoveable, 'immobile ædificatum seu fixum super suis pedibus, seu base, quod habet totam integram planitiem seu mensam superiorem,' and it is required to be 'lapideum, et ab Episcopo consecratum.' The treatise then proceeds to state that by most ancient usage, as early as the Council of Tours, in the year 567, the standard of the Cross, 'Vexillum crucis,' was to be placed in the middle of the Altar; it states that by the term 'Cross' is meant 'the crucifix;' and it refers to two comparatively modern declarations on the subject by the Holy See, one in 1746, and another in 1822, by which orders are given with respect to the size and position of the crucifix on the Altar. It then refers to the lights upon the Altar; 'Ad utrumque crucis latus cereum in missæ sacrificio accendi jubet ecclesia,' p. 21; and it refers to the Rubric, by which it is ordered: 'Collocetur crux et candelabra saltem duo.' p. 23.

"Such, then, as regards its form, is the Roman Catholic Altar. A stone structure fixed in the Church, and immoveable, with a plane surface, or mensa, on which the unbloody sacrifice ('sacrificium incruentum') may be offered; on which the Host and the Cup—('Hostia et Calix')—may be placed with a crucifix, and two candlesticks, as essential adjuncts to it.

"At the date of the First Prayer Book of Edward the Sixth the doctrine of the English Church as to the real presence and the nature of the Holy Communion was undecided; the Book, therefore, enjoined no change in the form of the Altar, but spoke of the rite itself as the Lord's Supper, commonly called the High Mass, and of the structure indifferently by the names of the 'Altar,' and the 'Lord's Table.' It contains a prayer for the consecration of the sacred elements, in which the sign of the cross is to be used. The bread is to be

unleavened, and round as it was aforetime. The corporas, the paten, the chalice, the vestments, are all articles directed to be used in the Roman Catholic Ritual, and spoken of by those names in the Missal.

"But by the time when the Second Prayer Book was introduced, a great change had taken place in the opinion of the English Church, and the consequence was, that on the revision of the service, these several matters were completely altered;[1] the use of a surplice was substituted for the several vestments previously enjoined; material alterations were introduced in the prayer of consecration; the bread and wine delivered to the communicants were no longer described as the Body and Blood of Christ, as was the case in the First Prayer Book; the Table was no longer spoken of as the Altar, but as the Lord's table, or as God's board; and the Table is to have, at the time of the Communion, a fair white linen cloth upon it, and is to stand in the body of the Church, or in the Chancel, where Morning Prayer and Evening Prayer are appointed to be said. And it is declared by the Rubric that, 'to take away the superstition which any person hath, or might have, in the bread and wine, it shall suffice that the bread be such as is usual to be eaten at the table with other meals, but the best and purest wheaten bread that conveniently may be gotten. And if any of the bread and wine remain, the Curate shall have it to his own use.'

"The distinction between the Supper of the Lord and the sacrifice of the Mass, is set forth with great precision in the Articles agreed upon in Convocation in the year 1562, soon after the accession of Queen Elizabeth, and which still form the Articles of the Church of England. The Twenty-eighth

[1] The chief alterations introduced by the Second Prayer-Book, as epitomized by Wheatly, were the following:—the addition of the *sentences, exhortation, confession,* and *absolution,* at the beginning of the morning and evening services; the omission of certain ceremonies, such as the use of *oil in baptism,* and the *unction of the sick,* of prayers for departed souls, of the *invocation of the Holy Ghost* in the consecration of the Eucharist, and of the *prayer of oblation.* The mixture of water with wine was no longer prescribed, the *habits* authorized by the first Prayer-book were ordered to be laid aside, and a rubric was appended to the Communion Service, to explain the reason of kneeling at the Sacrament.—Wheatly on the Book of Common Prayer. Appendix to the Introductory Discourse.

Article, 'Of the Lord's Supper,' contains this clause. 'The Supper of the Lord is not only a sign of the love that Christians ought to have amongst themselves one to another; but rather is a Sacrament of our Redemption by Christ's death; insomuch that to such as rightly, worthily, and with faith, receive the same, the Bread which we break is a partaking of the Body of Christ, and likewise the Cup of Blessing is a partaking of the Blood of Christ.' The Article then contains a declaration against transubstantiation;[1] and Article XXXI. entitled 'Of the one Oblation of Christ finished upon the Cross,' declares that 'the sacrifices of Masses, in the which it was commonly said that the Priest did offer Christ for the quick and the dead, to have remission of pain or guilt, were blasphemous fables, and dangerous deceits.'

"This change in the view taken of the nature of the Sacrament, naturally called for a corresponding change in the ancient Altar. It was no longer to be an Altar of sacrifice, but merely a Table, at which the communicants were to partake of the Lord's Supper.

"Accordingly, it appears that, with or without sufficient authority, such change had been carried into effect in the majority of Churches before the Act of the 5th & 6th Edward the Sixth was passed.

"At his visitation in 1550, Bishop Ridley issued Injunctions, in which, after forbidding the use of superaltaries, he introduces, amongst other directions, the following item:— 'Whereas in divers places some use the Lord's board after the form of a Table, and some as an Altar, whereby dissension is perceived to arise among the unlearned; therefore wishing a godly unity to be observed in all our Diocese; and for that the form of a table may more move and turn the simple from the old superstitious opinions of the Popish mass, and to the right use of the Lord's Supper, we exhort the Curates, Churchwardens, and Questmen here present to erect and set up the Lord's board after the form of an honest Table decently covered in such place of the quire or chancel as shall be thought most meet by their discretion and agreement, so that the Ministers

[1] The original forty-two articles had contravened the doctrine of the real presence.

with the communicants may have their place separated from the rest of the people; and to take down and abolish all other by-altars or tables.' 1 Card. Doc. Ann. No. xxi. p. 94. (Edit. 1844.)

"This Injunction extended only to Ridley's own diocese, and probably had no binding force even there; but an order was afterwards, in the month of November in the same year, issued by the King's Council to Ridley and the other Bishops, reciting that in most of the Churches the Altars were already taken down, and ordering that those which still remained should be taken down, and Tables substituted. 1 Card. Doc. Ann. No. xxiv. p. 100. (Edit. 1844.)

"Bishop Burnet remarks upon those changes, that the reasons for them were to remove the people from the superstitious opinions of the Popish Mass, and that a Table was a more proper name than an Altar for that on which the Sacrament was laid. He says:—'It was observed that Altars were erected for the sacrifices under the law, which ceasing they also were to cease, and that Christ had instituted the Sacrament, not at an altar, but a table, and it had been ordered by the Preface to the Book of Common Prayer, that if any doubt arose about any part of it, the determining of it should be referred to the Bishop of the diocese. Upon these reasons, therefore, was this change ordered to be made in all England, which was universally executed this year.'—Burnet, Hist. of Ref. Pt. II. B. I. vol. ii. p. 329. (Oxf. Edit. 1829.)

"By the Injunctions of Queen Elizabeth, issued in the first year of her reign—1 Card. Doc. Ann. p. 210 (Edit. 1844), it is ordered, ib. 234, 'that the holy table in every church be decently made, and set in the place, where the altar stood, and there commonly covered, as thereto belongeth, and as shall be appointed by the visitors, and so to stand, saving when the communion of the sacrament is to be distributed; at which time the same shall be so placed in good sort within the chancel, as whereby the Minister may be more conveniently heard of the communicants in his prayer and ministration, and the communicants also more conveniently, and in more number, communicate with the said Minister. And after the communion done, from time to time the same holy table to be placed where it stood before.'

"These Injunctions plainly show that the Communion of the Lord's Supper was to be held at a Table, as distinguished from an Altar, a Table in the ordinary meaning of that term; that as by the Rubric the bread used was to be 'the ordinary bread eaten at table with other meats,' so the Table was to be of the character of those employed on such occasions; that it was not only to be moveable, but was from time to time to be moved. The 82d Canon of 1604, that which is now in force, introduces no material alterations; it assumes the existence in all Churches of convenient and decent Tables for the celebration of the Holy Communion, and provides that they shall be kept in repair. It orders that the Table be covered in time of Divine service with a carpet of silk or other decent stuff thought meet by the Ordinary, and at the time of the ministration with a fair linen cloth as becometh that Table.

"Since this period no alteration has been made in the law with respect to the nature of the Table to be used. The Rubric of the present Prayer Book provides only that at the Communion time, the Table, having a fair white linen cloth upon it, shall stand in the body of the Church or Chancel, where Morning and Evening Prayer are appointed to be said; and the Priest is to commence the service standing at the north side of the Table. The term 'Altar' is never used to describe it,[1] and there is an express declaration at the close of the service against the doctrine of transubstantiation, with which the ideas of an Altar and sacrifice are closely connected.

"Under these circumstances, the first question is, whether the stone structure at St. Barnabas' is a Communion Table within the meaning of the Canons and the Rubric; and their Lordships are clearly of opinion that it is not. The case is within the principle of Sir Herbert Jenner Fust's decision, in *Faulkner* v. *Litchfield* (1 Robertson's Eccl. Reps. 184), from which indeed the present proceeding is in effect an appeal."[2]

[1] That is, in the Prayer-Book. In the Church Building Acts, 59 George III. chap. 134, sect. 6, and 2 & 3 William IV. chap. 61, sect. 1, the word 'Altar' is used.

[2] It had been contended by Sir F. Kelly, in argument, on behalf of Mr. Liddell, that the principle of decision in *Faulkner* v. *Litchfield* only condemned an immoveable altar, and did not prohibit its being made of stone.

In the elaborate Judgment in that case, the whole subject is discussed with a learning and ability which make it useless on the present occasion to go further than their Lordships have already done into the authorities.[1] The decree complained of in the appeal of '*Liddell* v. *Beal*,' has ordered the Church or Chapel-wardens of St. Barnabas to remove the present structure of stone used as a Communion Table, and to provide instead thereof a moveable table of wood. Their Lordships had at first some doubt whether the law had prescribed of what material the Table should be made; but on further consideration, they are satisfied that the opinion expressed by Sir Herbert Jenner Fust, and adopted in the decree in this case, is well founded.

"The term 'Table,' and the corresponding Latin word 'mensa,' especially when it is considered for what purpose it was to be used, naturally import a table of the material of which tables are ordinarily made. The Communion Table was to be provided by the parish, was to be moveable, not by machinery, but by hand, and was actually to be very frequently moved.[2] Wood is a lighter and cheaper material than stone, and the circumstance that the old Altar was necessarily of stone would be an additional reason with the Reformers for requiring that the Table should be of wood. The Canons of 1571, expressly provide that it shall be of that material—'mensa ex asseribus compositè juncta;' and although those Canons, not having received the Royal assent, were not of themselves of binding force, it is probable that they were generally acted upon, and they sufficiently show what was at that time understood to be the proper material of the Table which, under the Act of Elizabeth and the regulations of Edward the Sixth, was to be substituted for the Altar.

"The Canons of 1604, which are now in force, do not contain any provision upon this point. They speak of Communion Tables as things which already exist in Parish Churches, and provide for their repair, and give minute

[1] The foregoing paragraphs, however, contain an ampler discussion of the "altar" question than is to be found in the judgments of either of the courts below.

[2] This is authorized by the 82d Canon.

directions as to the covering to be used. If any doubt had existed at that time as to the material of the Table itself, it is not probable that the Canons would have omitted all notice of this question. Their Lordships, therefore, are satisfied that the decision upon this point in '*Faulkner* v. *Litchfield*,' is well founded, and they must advise Her Majesty that the Decree as to the removal of the stone structure at St. Barnabas', and the Cross upon it, and the substitution of a Communion Table of wood, ought to be affirmed.

"Next with respect to the wooden cross attached to the Communion Table at St. Paul's. Their Lordships have already declared their opinion that the Communion Table intended by the Canon was a table in the ordinary sense of the word, flat and moveable, capable of being covered with a cloth, at which, or around which, the communicants might be placed in order to partake of the Lord's Supper, and the question is, whether the existence of a cross attached to the Table is consistent either with the spirit or with the letter of those regulations.[1] Their Lordships are clearly of opinion that it is not; and they must recommend that upon this point also the Decree complained of should be affirmed.

"It may be urged, and, indeed, was urged with great force by Counsel at the bar, that in modern usage the Communion Table never, in fact, is moved; that the general adoption of rails to fence off the Table from the rest of the Church shows that its removal is never contemplated; and that if it is not to be moved, it is useless to require it to be moveable; that if it be in such a form that a sufficient portion of it may be covered with a fair linen cloth to receive the sacred elements, it is idle to insist on the whole being capable of being covered.

"To these observations the answer is, that the distinction between an Altar and a Table is in itself essential; that the circumstances, therefore, which constitute the distinction, however trifling in themselves, are for that reason important; and that when positive rules are established by law, Courts of

[1] The illegality of this cross is here placed on an entirely new ground. It had been treated by Dr. Lushington and Sir J. Dodson as an independent "ornament," not as an appendage of a Communion Table.

Justice, when called into action by parties entitled to maintain the suit, are bound to enforce the law as they find it, leaving it to the Legislature, if it see fit, in any manner to alter it.

"The next question is, as to the Credence Tables.

"Here the Rubrics of the Prayer Book become important. Their Lordships entirely agree with the opinions expressed by the learned Judges in these cases, and in '*Faulkner* v. *Litchfield*,' that in the performance of the services, rites, and ceremonies ordered by the Prayer Book, the directions contained in it must be strictly observed; that no omission and no addition can be permitted; but they are not prepared to hold that the use of all articles not expressly mentioned in the Rubric, although quite consistent with, and even subsidiary to the service, is forbidden. Organs are not mentioned, yet because they are auxiliary to the singing, they are allowed. Pews, cushions to kneel upon, pulpit-cloths, hassocks, seats by the Communion Table, are in constant use, yet they are not mentioned in the Rubric.

"Now, what is a Credence table? it is simply a small side-table, on which the bread and wine are placed before the consecration, having no connexion with any superstitious usage of the Church of Rome. Their removal has been ordered on the ground that they are adjuncts to an Altar; their Lordships cannot but think that they are more properly to be regarded as adjuncts to a Communion Table.

"The Rubric directs that at a certain point in the course of the Communion Service (for this is, no doubt, the true meaning of the Rubric) the Minister shall place the bread and wine on the Communion Table, but where they are to be placed previously is nowhere stated. In practice they are usually placed on the Communion Table before the commencement of the service, but this certainly is not according to the order prescribed. Nothing seems to be less objectionable than a small side-table, from which they may be conveniently reached by the officiating Minister, and at the proper time transferred to the Communion Table.[1]

[1] Their Lordships adopt Sir F. Kelly's argument on this point, and overrule *Faulkner* v. *Litchfield*, which the two Courts below held themselves bound to follow implicitly.

"As to the Credence Tables their Lordships, therefore, must advise a reversal of the sentence complained of.

"Next, as to the embroidered cloths, it is said that the Canon orders a covering of silk, or of some other proper material, but that it does not mention, and therefore by implication excludes, more than one covering. Their Lordships are unable to adopt this construction.[1] An order that a Table shall always be covered with a cloth surely does not imply that it shall always be covered with the same cloth or with a cloth of the same colour or texture. The object of this Canon seems to be to secure a cloth of a sufficiently handsome description, not to guard against too much splendour. In practice, as was justly observed at the Bar, black cloths are in many Churches used during Lent, and on the death of the Sovereign and some other occasions, and there seems nothing objectionable in the practice. Whether the cloths so used are suitable, or not, is a matter to be left to the discretion of the Ordinary. In this case their Lordships do not see any sufficient reason for interference, and they must, therefore, advise the reversal of the sentence as to the cloths used for the covering of the Lord's Table during the time of Divine Service, both with respect to St. Paul's and to St. Barnabas'.

"The last question is, with respect to the embroidered linen and lace used on the Communion Table at the time of the ministration of the Holy Communion. The Rubric and the Canon prescribe the use of a fair white linen cloth, and both the learned Judges in the Court below have been of opinion that embroidery and lace are not consistent with the meaning of that expression, having regard to the nature of the Table upon which the cloth is to be used. Although their Lordships are not disposed in any case to restrict within narrower limits than the law has imposed, the discretion

[1] The "construction" thus stated is not exactly that of Dr. Lushington. He took exception, not to the number, but to the colour, of these cloths, and finding no authority for the use of variegated coverings, pronounced them an innovation in the direction of Romish practices. Sir J. Dodson insisted on their being contrary to usage, and declined to reverse on such a point the discretion of the Ordinary, as declared in the Consistory Court. In this paragraph that discretion is treated as distinct from the judgment of the Consistory Court.

which, within those limits, is justly allowed to congregations by the rules both of the Ecclesiastical and the Common Law Courts, the directions of the Rubric must be complied with; and upon the whole their Lordships do not dissent from the construction of the Rubric adopted by the present decree upon this point; and they must, therefore, advise Her Majesty to affirm it.

"As the judgments in these cases have been materially altered, and such alterations ought to have been made at the hearing in the Arches Court, so much of the sentence of that Court in each case as awards costs against the Appellants must of course be reversed; and in those proceedings, as well as in the present appeals, each party must bear their own costs.

"In the case of '*Gorham* v. *the Bishop of Exeter*,' when a difference of opinion as to the judgment existed amongst the Prelates who attended at the hearing, it was thought proper publicly to announce such difference. In the present case it is satisfactory to their Lordships to be able to state, that both His Grace the Archbishop of Canterbury and the Lord Bishop of London concur in the Judgment which has just been delivered."

DITCHER *v.* DENISON.

1858.

THE Members of the Judicial Committee present at this Appeal were :—

THE BISHOP OF LONDON (Tait).	SIR E. RYAN.
THE LORD JUSTICE KNIGHT BRUCE.	THE LORD JUSTICE TURNER.
MR. PEMBERTON LEIGH.	SIR J. PATTESON.

[The Judgment of the Privy Council in this case was limited to the construction of the 20th section of the Church Discipline Act (3 & 4 Vict. c. 86), which enacts that "every suit or proceeding against any Clerk in Holy Orders, for an offence against the laws Ecclesiastical, shall be commenced within two years after the commission of the offence in respect of which the suit or proceeding shall be instituted, and not afterwards." It was held :—

1. That neither the issuing of a Commission of Inquiry under that Act, nor the Report of the Commissioners, nor the filing of Articles thereupon, nor the service of such Articles on the accused, constitutes the commencement of a suit or proceeding, within the meaning of this Section.

2. That the "suit or proceeding" commences with the service of a citation on the accused, requiring him to appear at a certain time and place before a competent Court, to answer definite charges, under the 9th and 10th sections of the Act.

3. That the Church Discipline Act is "at once a law of criminal procedure as to the offences to which it relates, and a Statute of Limitations as to penal prosecutions," and that, therefore, "the presumption or inclination ought to be, not against, but in favour of, the person charged with an offence and sued penally under it."]

In the the latter part of 1854,[1] the Appellant, the Rev. Joseph Ditcher, Vicar of South Brent, Somerset, preferred a complaint against the Respondent, the Ven. George Anthony Denison, Vicar of East Brent, and Archdeacon of Taunton,

[1] Before this time a long correspondence had passed between Mr. Ditcher and two successive Bishops of Bath and Wells, relative to Letters of Request. Mr. Ditcher's final application to the Archbishop for a Commission of Inquiry was dated August 2d, 1854. On September 5th, the Archbishop wrote to the Archdeacon, informing him of his intention to issue the Commission.

before the Archbishop of Canterbury.[1] The charge was that the Archdeacon had affirmed doctrines contrary to the Articles of Religion, in three sermons, preached in Wells Cathedral, on the 7th of August, 1853, the 6th of November, 1853, and the 14th of May, 1854. The Archbishop thereupon issued a notice to the Archdeacon, dated the 31st of October, 1854, under the 3d section of the Church Discipline Act, informing him that a Commission of Inquiry was about to be appointed. A more formal notice was served upon the Archdeacon on the 3d of November, 1854, and the Commission was issued on the 30th of November. On the 21st of December the Commissioners notified the time and place of their intended meeting, which was accordingly held at Clevedon, on the 3d, 4th, 5th, and 6th of January, 1855. On the 10th of January, 1855, the Commissioners reported that the sermons afforded *primâ facie* grounds for proceedings, and recorded their opinion upon one passage in the following terms: "That the proposition of the Ven. Archdeacon of Taunton, 'that to all who come to the Lord's Table, to those who eat and drink worthily, and to those who eat and drink unworthily, the Body and Blood of Christ are given; and that by all who come to the Lord's Table, by those who eat and drink worthily, and by those who eat and drink unworthily, the Body and Blood of Christ are received,' is directly contrary or repugnant to the doctrine of the Church of England, and especially to the Articles of Religion, and that the doctrines as set forth in the aforesaid sermons with reference to the Real Presence in the Holy Eucharist are unsupported by the Articles taken in their literal and grammatical sense, are contrary to the doctrine and teaching of the Church of England, and have a very dangerous tendency."

This Report having been presented to the Archbishop of Canterbury, and the Bishop of Bath and Wells having declined, upon a renewed application, to institute further proceedings by Letters of Request,[2] articles were prepared and

[1] Sect. 24 of the Church Discipline Act (3 and 4 Vict. 86) provides that the Archbishop of the province shall act instead of the Bishop, where the latter is patron of any preferment held by the accused party.

[2] The Bishop's letter, announcing this resolution, and assigning reasons, was dated January 18th, 1855.

deposited, on the part of Mr. Ditcher, both at London and Wells, and a copy was served on the Archdeacon upon the 4th or 5th of August, 1855. The Archbishop was then urged to constitute a Court for the hearing of the case, under 3 & 4 Vict. cap. 86, s. 11. This he hesitated to do, upon which a motion was made in the Court of Queen's Bench (November 22, 1855) to compel him, by way of *mandamus*, to proceed. A rule was obtained, and was ultimately made peremptory on the 19th of April, 1856, in obedience to which the Archbishop cited Archdeacon Denison to appear before him in the Common Hall of Doctors' Commons, but this return was quashed by the Court on the 26th of May, and, on the 5th of June, the Archdeacon was formally summoned to appear at Bath.[1]

The Archdeacon accordingly appeared, but under a protest, to the effect that the citation to Bath, dated June 5th and served upon him June 10th, was the commencement of the suit, and that the articles did not allege any offence, having been the subject of inquiry before the Commissioners, as committed by him within two years previously, that being the period limited by the 20th section of the Church Discipline Act. This protest was overruled,[2] and the case was argued on the merits before the Archbishop and his assessors, Dr. Lushington, the Rev. Dr. Heurtley (Margaret Professor of Divinity at Oxford), and the Dean of Wells (Rev. G. H. S. Johnson), on the 22d of July and the five following days. On the 24th, the Court declared its opinion that the preaching and publishing, within the diocese, of the 1st sermon, dated 7th August, 1853, was proved; that the publishing but not the preaching of the 2d sermon, dated November 6, 1853, was proved; but that neither the preaching nor the publishing of the 3d sermon, dated May 14, 1854, was proved. After the hearing the Court adjourned, and, on August 12, Dr. Lushington read a

[1] Mr. Moore, in his Report of this case (11 Moore's P. C. Cases, p. 327), mentions the 6th of June as the day on which the Archbishop made his final return to the mandamus. Mr. Ditcher, in a published "Statement" of the case, mentions the 26th.

[2] It was this protest which was afterwards allowed by the Arches Court, and upon which the final judgment of the Privy Council was given in Archdeacon Denison's favour.

Declaration, in the nature of an interlocutory Judgment, of which the following are the material passages:—

"Whereas it is pleaded in the said 9th article filed in this proceeding, that the said Archdeacon, in a sermon preached by him in the cathedral church of Wells, on or about Sunday, August 7, 1853, did advisedly maintain and affirm doctrines directly contrary and repugnant to the 25th, 28th, 29th, and 35th Articles of Religion, referred to in the 13th Eliz. c. 12, or some or one of them, and, amongst other things, did therein advisedly maintain and affirm, 'That the Body and Blood of Christ, being really present after an immaterial and spiritual manner in the consecrated Bread and Wine, are therein and thereby given to all, and are received by all, who come to the Lord's Table;' and, 'That to all who come to the Lord's Table, to those who eat and drink worthily and to those who eat and drink unworthily, the Body and Blood of Christ are given; and that by all who come to the Lord's Table, by those who eat and drink worthily, and by those who eat and drink unworthily, the Body and Blood of Christ are received,'—His Grace, with the assistance and unanimous concurrence of his Assessors, has determined that the doctrine in the said passages is directly contrary and repugnant to the 28th and 29th of the said Articles of Religion mentioned in the aforesaid Statute of Queen Elizabeth, and that the construction put upon the said Articles of Religion by the Venerable the Archdeacon of Taunton, viz. that the Body and Blood of Christ become so joined to and become so present in the Consecrated Elements, by the act of consecration, that the unworthy receivers receive in the elements the Body and Blood of Christ, is not the true or an admissible construction of the said Articles of Religion. That such doctrine is directly contrary and repugnant to the 28th and 29th Articles; and that the true and legal exposition of the said Articles is, 'That the Body and Blood of Christ are taken and received by the worthy receivers only, who, in taking and receiving the same by faith, do spiritually eat the Flesh of Christ and drink his Blood; whilst the wicked and unworthy, by eating the bread and drinking the wine without faith, do not in any wise eat, take, or receive, the Body and Blood of Christ, being

devoid of faith, whereby only the Body and Blood of Christ can be taken, eaten and received.'

"Whereas it is pleaded in the said 14th of the articles filed in this proceeding, that divers printed copies of a sermon or discourse, in the 12th article mentioned as written or printed or caused to be printed by the said Archdeacon,[1] was, by his order and direction, sold and distributed, in the years 1853 and 1854, within the said diocese of Bath and Wells; and whereas the said sermon or discourse contains the following amongst other passages: 'That to all who come to the Lord's Table, to those who eat and drink worthily, and to those who eat and drink unworthily, the Body and Blood of Christ are given; and that by all who come to the Lord's Table, by those who eat and drink worthily and by those who eat and drink unworthily, the Body and Blood of Christ are received;' and 'It is not true that the Consecrated Bread and Wine are changed in their natural substances, for they remain in their very natural substances, and therefore may not be adored. It *is* true that worship is due to the Real, though invisible and supernatural presence of the Body and Blood of Christ in the Holy Eucharist, under the form of bread and wine,'—His Grace, with the assistance of his Assessors, has determined that the doctrines in the said passages are directly contrary and repugnant to the 28th and 29th of the said Articles of Religion mentioned in the aforesaid Statute of Queen Elizabeth."

Dr. Lushington also intimated that the sale and distribution of the former sermon, during the years 1853 and 1854, was a "repetition of the erroneous doctrine charged in the 9th article," and concluded by allowing the Archdeacon time, until the 1st of October, to revoke his errors.

Two protests were delivered into the Registry in the interval, the one by the Archdeacon himself, the other by his proctor. In the former he denied that he had "advisedly" affirmed anything contrary to the Articles, or put any sense upon them but what is agreeable to "the mind and purpose of the Old Fathers." He also demurred to "the true and legal exposition of the Articles as put forth by the Court," and

[1] The Sermon of November 6, 1853.

complained of being required to revoke "the doctrines contained" in the sermons, instead of being required to recall particular passages. He then proceeded to explain his own opinions by quotations from divines of the English Church. In the latter, exception was taken to the use of the 29th Article as a standard of doctrine, on the alleged ground that this Article is omitted in that copy which received statutable authority by the Act 13 Eliz. c. 12.[1]

On the 21st of October, the Court met and heard counsel on these protests, which were overruled on the following day by Dr. Lushington. The Court declared its opinion, "That the evidence offered is, in part at least, not legally admissible, and, if all were admissible, totally inadequate to support the proposition for which it is produced, or to satisfy that *onus probandi*, that burden of proof, which, indeed, it is not denied, falls upon those who deny usage of such long standing, and supported by such high authority."

The Archdeacon was then called upon to retract the two propositions already cited. Dr. Phillimore, on his behalf, delivered in a paper which the Court considered a mere reiteration of the obnoxious doctrines.

On the same day (October 22d, 1856) judgment was pronounced by Dr. Lushington. Dealing first with the questions of fact, he declared "That the Court is unanimously of opinion that the preaching of the sermon dated Sunday, the 7th of

[1] It is well known that the Articles long remained without Parliamentary sanction. This was first conferred upon them by the "*Act for Ministers of the Church to be of sound religion*," passed in 1570, which refers to them as "Articles whereupon it was agreed by the Archbishops and Bishops of both Provinces and the whole Clergy assembled in the Convocation, holden at London, in the year of our Lord God 1562, according to the computation of the Church of England, for the avoiding of the diversities of opinions, and for the establishing of consent touching true religion put forth by the Queen's authority;" a title which seems to recognise an English edition. Now, the 29th Article was omitted in the impression of 1563, which is supposed to have been the one ratified by Parliament in 1570. See "Soame's Elizabethan Religious History," pp. 156-8. That author, however, admitting the fact of the suppression, which he attributes to the wish of the Queen and Cecil to spare the feelings of the Romanists, continues as follows:—"Practically, these antient variations in copies of the Articles have lost all importance. The 36th Canon, confirmed by the Act of Uniformity under Charles II. renders the whole body of Articles passed in the Convocation usually dated 1562, legally binding upon the clergy."

August, 1853, at Wells, which sermon is charged in the Articles, is proved to have been preached by Archdeacon Denison; and that the publishing the same by his authority within the diocese of Bath and Wells is also proved. That the publishing, but not the preaching, within the diocese of Bath and Wells, of the second sermon, dated Sunday, November the 6th, 1853, by the authority of Archdeacon Denison, as charged in the articles, is proved. That there is no sufficient proof to satisfy the Court of the preaching or publishing the third sermon, dated May the 14th, 1854, within the diocese of Bath and Wells."

He next considered the argument that the Archdeacon had not "advisedly" contravened the Articles, so as to commit an offence under the Act of Elizabeth. Rejecting that construction of the word "advisedly," which would involve the necessity of proving in each case an avowed purpose of infringing the law, he thus laid down the principle to be applied by the Court. "If a sermon or tract be compared with the Articles, and found clearly repugnant to them, the intention to contravene must be inferred, for in all the transactions of life, a man must be judged by the evident consequences of his acts, and be taken to intend the effect of what he has deliberately done. The Court declared its opinion that the acts done by the Archdeacon, viz. the preaching and publishing the sermons, as proved in this case, were acts advisedly done according to the true construction of the statute; and, after careful consideration, for the reasons already stated, the Court adheres to that opinion, and, consequently, if the doctrines maintained by the Archdeacon are contrary and repugnant to the Articles, an offence has been committed against the statute."

He then entered into a discussion of the rules which ought to govern a judicial interpretation of the Articles. These he held to have been finally determined in the Gorham case, expressing his entire concurrence with the reasons there assigned, but pointing out the more limited nature of the inquiry in the case of Archdeacon Denison. From this authority, as well as from that of Lord Coke, and "a long course of legal decisions," he deduced the proposition that where the sense of the Articles (as incorporated into the

statute-law) is plain, no usage or evidence as to the opinions of divines can be allowed to modify it. "The most important of all these rules, and which must be applied before all others, is, therefore, that where anything has been clearly expressed by the words of the Articles, no other meaning should be attempted to be put upon them by reference to any authority whatever, neither by reference to the Scriptures, nor to the Fathers, nor to usage, nor to any authority prior or subsequent to the Reformation. And this rule is not only founded on authority, but on sound reason. There would be no certainty in any written instruments, no reliance could be placed on any document, if, where the meaning was apparent and clear, a different interpretation could be put upon it by reference to another document, or other authority whatever."

He further showed that if it were competent for the Court "to decide whether the doctrines of the Archdeacon might be deemed theologically sound or unsound," instead of whether they were or were not repugnant to the Articles, then the Articles would cease to be an ultimate settlement of doctrinal questions. It would always be easy to extract isolated passages from the works of eminent divines, to overrule or revise their plain meaning, if this were not held to be decisive. It was only when "an Article was fairly capable of two meanings" that such references would be admissible, and, in that case, recourse should be had in the first place to the Liturgy and the other Formularies.

Applying these principles to the doctrines maintained in the passages articled against the Archdeacon, Dr. Lushington announced the adherence of the Court to the conclusion indicated in the declaration of August 12th, notwithstanding the protest of the Archdeacon against an omission which, as he alleged, was "not material only, but integral."[1] That conclusion was, in effect, "That the doctrines maintained in the passages contained in the sermons of the Venerable

[1] This was the omission of any reference to the two following passages in the Sermons:—"That the receiving of the Body and Blood of Christ in the Lord's Supper by one unworthy is unto condemnation," and "That it is not true that the Holy Sacraments save *ex opere operato*—i.e. by the mere act of receiving."

Archdeacon, as pleaded in the 9th, 11th, and 14th of the articles filed in this proceeding, as before stated, are directly contrary and repugnant to the 28th and 29th of the Articles of Religion, mentioned in the statute of the 13th Elizabeth, chap. 12—to wit, the Articles severally entitled 'Of the Lord's Supper,' and 'Of the Wicked, which do not eat the Body of Christ in the Use of the Lord's Supper.'" The Archdeacon having declined to revoke his errors, and having failed in the paper delivered by him into the Registry to justify himself in not doing so, stood convicted of openly contravening the Articles, especially in the assertion "That worship is due to the real, though invisible and supernatural presence of the Body and Blood of Christ in the Holy Eucharist, under the form of Bread and Wine." Adverting to the argument that similar opinions had been propounded without censure by eminent divines, Dr. Lushington continued: "The Court cannot acknowledge these detached extracts as explanations of the Articles of Religion which the teaching of the Archdeacon is charged to have impugned, nor can it admit that they were so intended, nor that those eminent divines, professing to explain the Articles in question, supported in their works the doctrines set forth by the Archdeacon; but, in truth, it is not the duty of the Court to weigh the opinions of divines in a case like this. The 28th and 29th Articles of Religion clearly express the meaning intended—there is no ambiguity, no doubt to be cleared up, which would justify a resort to other sources of information for explanation."

Lastly, after combating the suggestion of the Archdeacon, that his language might have conveyed an idea foreign to his purpose, which was to conform his teaching to that of the Church of England, as expounded by the great divines to whom he referred, the Judge concluded as follows:—

"The Court cannot receive a disclaimer of the words employed, when it is the substance, and not the language only, which the Court holds to be contrary to the Articles. The Court is most anxious that its judgment should not be misunderstood, that it should not be supposed to express any opinion that the Clergy of this realm should be restrained in their just liberty of fully discussing or interpreting what is

really a subject (to use the words of Lord Stowell[1]) of dubious interpretation, or of advocating in such cases their own opinions. What the Court condemns is the imposition, by reference to extraneous sources, of a meaning contrary and repugnant to that which the plain words of the Article import, which, in fact, is tantamount to the alteration of the Articles themselves. The Archdeacon, having declined to make the revocation required of him, and having declared his firm adherence to the substance of that teaching which the Court has declared to be contrary and repugnant to the Articles, it becomes the duty of the Court to pronounce the sentence required by the statute—the sentence of deprivation."

The formal sentence was then signed. It contains a recapitulation of the passages condemned, and of the doctrines of the Church impugned by them.

From this sentence Archdeacon Denison appealed to the Arches Court of Canterbury. It was objected on behalf of Mr. Ditcher, that it was not competent to the Court of Arches to entertain the appeal, since the Dean of the Arches was only the Archbishop's Deputy, and the Dean of the Arches sustained this objection, and dismissed the appeal. Archdeacon Denison then applied to the Court of Queen's Bench for a mandamus, and that Court on the 28th of January, 1857, directed a mandamus to issue to the Dean of the Arches to entertain and hear the appeal, on the ground that the Court of Bath and Wells was an inferior Diocesan Court, and that the Archbishop was only acting as Bishop of Bath and Wells, *pro hâc vice*, and that the appeal under the 3rd & 4th Vict. c. 86, properly lay to the Court of Arches. The appeal in the Court of Arches was afterwards prosecuted, and in the month of April, 1857, came on for hearing, when Counsel on behalf of Archdeacon Denison insisted, that the validity of the protest should be argued and decided in the first instance; and acceding to that application, the Dean of the Arches (The Right Hon. Sir John Dodson) assigned to hear in the first instance arguments on the objection on the ground of limitation of the suit by lapse of time set forth in that protest; and on the 23d of April, 1857, Judgment was pronounced.

[1] In Stone's case, see below, p. 351.

After reviewing the history of the case up to its last stage, and dwelling on the language of the 20th section, the Judge dealt first with the argument, that the proceeding was commenced by the issuing of the Commission. This view he rejected, on the ground that the Commissioners have no power to compel the attendance of the accused, or to inflict punishment upon him, if they should find the charges proved.

He next considered the effect of serving the Articles upon the Archdeacon, which he held to be "a very imperfect notice," inasmuch as, until further proceedings be taken, the party may disregard the service; nor is he thereby apprized of the place where, or of the Judge before whom, he is to appear.

He then showed that no hardship resulting from delay interposed by the default of the Archbishop, or any other person, could be alleged to prejudice the Defendant; and, reverting to the terms of the Act, continued:—"It appears to me, therefore, that these terms, that no suit or proceeding shall be instituted after two years, are confined to legal proceedings in the nature of a suit or proceeding. 'No suit or proceeding,' or 'proceeding or suit,' are terms which are to be reckoned precisely the same. There is no difference. Then, I apprehend that the Act must mean the suit, and not the preliminary inquiry, whether there should be a suit or not. That is in itself no 'suit or proceeding.' Here, undoubtedly, is a suit, but not within the two years; and, consequently, as it appears to the Court, the charge brought against Archdeacon Denison does not come within the period required by the Statute."

Referring to the cases afterwards cited in the Judgment of the Privy Council, he expressed a strong opinion that a proceeding, such as that at Bath, before a Bishop and his assessors, is as much the commencement of a suit as a proceeding upon Letters of Request, which it was admitted would constitute such a commencement.

Upon these grounds, Sir J. Dodson affirmed the validity of the protest, and dismissed the Respondent from all further observance of justice in the suit, but made no order as to costs.

Mr. Ditcher appealed from this decree to the Privy Council, and the case was argued on the question of limitation alone.

On the 6th of February, 1858, Judgment was delivered by Lord Justice Knight Bruce:—

"This is an appeal from a decree or definitive sentence of the Court of Arches, pronounced on the 23rd of April, 1857, in a cause of appeal before that jurisdiction, to which the parties were two clergymen of the Diocese of Wells and Bath; one, Joseph Ditcher, the Vicar of South Brent, in Somersetshire, the Appellant here; the other, George Anthony Denison, Vicar of the neighbouring parish of East Brent, and Archdeacon of Taunton, the Respondent here. But in that Court their positions were reversed.

"The controversy arose thus. It appears that the Vicar of East Brent preached and published in the years 1853 and 1854, certain sermons which the Vicar of South Brent disapproved; whereupon (the preferments held by the Vicar of East Brent being in the gift of the Bishop of Bath and Wells, in the right of that See), Ditcher, the Appellant, in October, 1854, made formally to the Archbishop of Canterbury, under the Statute the 3rd & 4th Vict. c. 86, called 'The Church DisciplineAct,' a written application or complaint.—[His Lordship here referred to the steps that had been taken, which are fully detailed in the statement of the case, and proceeded.]—The only point decided in the Arches Court by the decree or sentence under appeal having been that of time, the question is, whether the Appellant was barred and the Respondent protected by the 20th section of the Act in question. It is on this Statute that much, or everything, turns here at present; whether under it, and in pursuance of it, the Archbishop had jurisdiction or authority to pronounce the decree or sentence of deprivation pronounced at Bath, which (reversed by the Court of Arches) the Appellant by the present appeal seeks to set up again; for no other point has been argued before us. The parties have reserved themselves upon every other part of the litigation (in the event of a different view being taken here from that taken by Sir John Dodson), for a future discussion, or future discussions, here or elsewhere,

or both elsewhere and here :—the Respondent continuing to reject all imputation of heresy, while the Appellant still maintains that the impeached sermons exhibit heterodox opinions. We, however, have only to endeavour to reach at a proper conclusion as to the sufficiency, or insufficiency, of the alleged bar by time, under the 20th section of the Church Discipline Act.

"First, then, what is the true reading, and what the meaning, of that section, and more especially its commencing paragraph? A question upon which, if of easy solution, it is not likely that two such competent interpreters as the Judge of the Consistory Court of London, and the Dean of the Arches, would have differed.

"Section twenty is in these terms: 'And be it enacted, that every suit or proceeding against any such Clerk in Holy Orders for any offence against the laws Ecclesiastical, shall be commenced within two years after the commission of the offence in respect of which the suit or proceeding shall be instituted, and not afterwards: Provided always, that whenever any such suit or proceeding shall be brought in respect of an offence for which a conviction shall have been obtained in any Court of Common Law, such suit or proceeding may be brought against the person convicted at any time within six calendar months after such conviction, although more than two years shall have elapsed since the commission of the offence in respect of which such suit or proceeding shall be so brought.' The words just read are found in a Statute containing twenty-six sections, every one of which has received from their Lordships great and prolonged (I had almost added painful) attention; for, probably, no Statute ever in a stronger degree required that not any portion should be judicially construed without knowing and weighing the whole.

"It cannot, in the first place, escape observation, that 'suit' is a word properly of less extent and less general applicability, than 'proceeding,' or that, possibly, every suit may be correctly termed a proceeding, though not every proceeding, a suit. It is also a good general rule in jurisprudence that one who reads a legal document, whether public or private, should not be prompt to ascribe, should not, without necessity or some

sound reason, impute to its language tautology or superfluity, and should be rather at the outset inclined to suppose each word intended to have some effect, or be of some use.

"It is plain, however, that where there is a report, that report must follow a Commission, and, of course, precede a suit founded thereon; but the word 'proceeding' comes in the 20th section after the word 'suit.' The 13th section, certainly, enables a Bishop to dispense with a report from Commissioners, so that there may be a suit under the Act without a report, and, probably, also without a Commission. As to the word 'or' occurring between 'suit' and 'proceeding,' in the 20th section, it is not, perhaps, immaterial to bear in mind the various purposes to which 'or' is applicable in the English language. The word 'proceeding' is, as a substantive, used in two other sections (the 17th and 23rd); the word 'proceedings' in the 7th, 13th, and 14th sections and elsewhere in the Act.

"In the 7th section, the word 'proceed' seems to deserve attention, as may also the expressions 'preliminary' and 'further' in the 4th section; and perhaps it is worth while to notice that the 17th section seemingly employs 'proceeding' in opposition to 'inquiry,' and to remark the purpose to which 'proceeding' is applied in the latter half of the 20th section. The expression 'for any offence' in that section must also be considered in connexion with the 3rd section, which may, without a 'charge,' be brought into operation and activity upon rumour merely: for so we suppose must be interpreted the words 'scandal or evil report.' Possibly, however, 'Commission' or 'proceeding by Commission,' or 'proceeding by way of Commission,' may be the meaning, or one meaning, of 'proceeding' in the 20th section; a reading which, if it does require, does not prohibit the attributing to the Act an intention that a suit should not, in any case, be commenced after the end of two years. If the framers had that intention, they may well have deemed it prudent to forbid (not merely by implication) the issuing of a Commission under which no report could bring an erring or a slandered clergyman for conviction or acquittal before an Ecclesiastical Judge. Having, with such aid as these and

some other considerations might afford, weighed the whole of the Statute (not, of course, without reference to the particular nature of the subjects with which it is concerned, and the state of the law on those subjects as it stood immediately before the passing of the Statute), their Lordships (differing, as they apprehend, on this point from the Most Reverend Prelate, and one, at least, of His Grace's Assessors) have come to the conclusion, that the phrase 'every suit or proceeding' in the 20th section, unless the phrase means 'every suit' merely, and nothing else, means 'every suit and every proceeding,' nor less nor more: (As if, in effect, instead of 'every suit or proceeding' 'shall be commenced within two years,' 'and not afterwards,' the Act had said 'not any suit, nor any proceeding' 'shall be commenced, unless within two years,' and had omitted 'and not afterwards.') Their Lordships consider also that the words 'suit or proceeding,' where they occur secondly, thirdly, fourthly, and fifthly, in the 20th section, must be construed of course by analogy to the construction proper to be put on the three words where they first occur in that section.

"Before entering on the next question, that relating specifically to the decree or sentence under appeal, it may be well to observe that, notwithstanding the loose and inaccurate language to be found in the Act, the Legislature, as their Lordships think, has made a sufficient distinction between a 'suit,' properly so called, and the preliminary inquiries out of which a suit may arise. A Clerk may, indeed, with the concurrence of his accuser, obviate the necessity for a suit by submitting to a sentence on the result of the preliminary inquiries; but, unless he thinks fit to do so, he has a right to have the case against him decided, *secundum allegata et probata*, in a suit regularly constituted.

"This 'cause' (so it is termed in section 11) may either be heard before the Bishop with Assessors, or may be sent by Letters of Request to the Court of the Archbishop. But it is hardly denied that, if the matter be sent to the Archbishop's Court, the suit is not commenced before the service of the citation; and, if so, it seems to follow that, if the suit be before the Bishop, it must be held to commence with the

proceeding before that Tribunal which is most analogous to the citation in the Archbishop's Court; for the Legislature can hardly have intended that the period limited for the institution of the suit, should vary according to the Court in which it is heard. We then come to the question, whether the 'suit' in which was pronounced the decree or sentence of deprivation pronounced at Bath in the year 1856, was 'commenced within two years after' the offence, or any offence in respect of which the 'suit' was 'instituted, and not afterwards;' or, in other words, whether there was a 'suit' 'commenced within two years after' the Respondent had committed any offence, or the imputed or alleged offence, charged against him. This question, stated in the terms that have been used (because the decree or sentence of deprivation was made, was pronounced, in a 'suit,' and could have no validity unless made in a 'suit' or pronounced in a 'suit,' —and because, if made or pronounced in an ill-founded suit, it cannot stand)—is one for the purpose of which their Lordships have been, and are, by the state of the evidence and the admissions, indeed, of the parties, enabled to dismiss from consideration, as Sir John Dodson was enabled to dismiss every, if any, such enunciation of heterodoxy—every, if any, such offence, as has taken place on the part of the Respondent since the year 1853. His conduct in and since the year 1854 it is agreed that we must, and we accordingly do, regard as wholly immaterial. If, therefore, the suit in controversy was not commenced before the year 1856, it was ill-commenced, and the decree or sentence must fail. Now, the Commission was issued in the year 1854; the report was made and registered in the year 1855; the articles were filed in August, 1855; and the service of a copy of them on the Respondent took place also in August, 1855: but not until April, 1856, or later, was there any citation of him, or any requisition for him, to appear before any Judge, or to appear anywhere. The Appellant's Counsel, however, have contended, that the Respondent was deprived, in a 'suit or proceeding' which they say was commenced by the Commission, or by what took place between the Commission and report, or by the report or its registration, or by the filing of the articles

in August, 1855, or by the service in that month of a copy of those articles on the Respondent. Their Lordships, however, are of opinion with Sir John Dodson, that this proposition is untenable. The report was not, the inquisition, or investigation, under the Commission was not, nor was the Commission, nor was the Appellant's application to the Archbishop for a Commission, a suit, or the commencement, or any part, of a suit. The Commission and the inquisition or investigation under it, were merely steps for obtaining the opinion, and the report was merely the opinion so obtained, of five clerical gentlemen, in the selection of not one of whom had the proposed *Reus* a voice, whether there was *primâ facie* ground for instituting a suit. Neither the report made, nor any report capable of being made under the Commission; no registration of the report, or of any report; no approval of it, amounted, or could have amounted, to an adjudication of heresy or error of any kind against the Respondent. He could not lawfully, before the year 1856, have been deprived, punished, or censured, without his consent, nor in, nor after the year 1856 was it, independently of what took place in April, 1856, or the following month, possible, without his consent, to deprive, punish, or censure him.

"Then, as to the filing of the articles in August, 1855, and the service in the same month of a copy of them on the Respondent, each of these steps he was entitled to disregard until served with a citation or requisition under the 9th section of the Act, in the manner directed by the 10th section; as long as there was no such service of a citation or requisition, the articles (though preventing Letters of Request) were, in truth, as against him, a nullity. The articles—not intituled in any Court, not headed, ended, or described, as belonging to or connected with any Court, purported to proceed from the Archbishop, as 'Primate of all England, and Metropolitan.' They did not cite, command, require, or invite the Respondent's attendance or appearance in any Court, or at any place or time, nor had any date of place or time; nor in fact until some time after March, 1856, was there any citation or requisition such as directed by the 9th section, or such as to require or make necessary any appear-

ance or attention upon the part of the Archdeacon, or to render any such step material for his protection or to his interest.

"And their Lordships, though in the present instance differing to some extent from the very able Judge who advised the Archbishop on the occasion of the Bath sentence, agree in the opinion then declared by that eminent lawyer, that the word 'suit,' used in the 20th section, 'means a suit in the Arches Court, or any other Court of that description.' Dr. Lushington added the words 'properly answering to the terms in which it is expressed;' but he did not, we believe, by those words intend to change the sense of what immediately preceded them. And, if we do not think with him that (to borrow again his language on the same occasion) 'in the suit in the Court of Arches, the issuing of a citation is the commencement of the suit,' we think that the service of the citation is so.—[His Lordship here referred to the judgment of the Right Hon. Dr. Lushington, at Bath, which was included in the transcript of the proceedings.]—The expression, however, 'think with him,' that I have used, may be not exactly accurate; for considering the cases of *Ray* v. *Sherwood* (1 Curteis, 173), and *Sherwood* v. *Ray* (1 Moore's P.C. Cases, 353), and the admitted course of the Ecclesiastical Courts at Doctors' Commons, their Lordships deem it likely, that in the passage just read, from the judicial opinion delivered at Bath, 'service' was said or meant in the place of 'issuing' where the latter word occurs. The circumstance that, by the 13th section of the Act, Letters of Request are prevented from issuing after articles are filed, as mentioned in the 7th section, does not appear to us to make the articles, or the filing of them, or the service of a copy of them, the commencement of a suit. They may, by the subsequent service of a valid citation, or requisition, be drawn down, in effect, to the date of that service, but cannot, as we conceive, bring up that service to an earlier date.

"The rule, or maxim, '*Semper in dubiis benigniora præferenda*,' is, we believe, as true in the law of England as it was in the Roman law, and the Statute before us is at once a law of criminal procedure as to the offences to which it relates,

and a Statute of Limitations as to penal prosecutions. With reference to that character, the presumption or inclination, where presumption or inclination can find place, ought to be, as their Lordships conceive, not against, but in favour of, the person charged with an offence, and sued penally under it.

"And their Lordships are of opinion, that they construe the 20th section consistently with the rules and idiom of the English language, and '*omni consideratâ scripturâ*,' agreeably to the spirit and general intention of this Act of Parliament, by holding, as they do, with the learned Dean of the Arches, that a suit was not instituted by the application for the Commission, or by the Commission, report, and articles, or by any one or more of them, or by the service of the articles on the Respondent; that the suit consequently, in which the Bath judgment was pronounced, was not commenced, was not a "proceeding" begun, before April, 1856; that the Respondent not having been proved to have committed any offence after the year 1853, there was accordingly no suit commenced within the time prescribed by the 20th section; that the Commission and report fall to the ground, therefore, and become wholly worthless; that every proceeding, if any, as existed before June, 1856, having thus, before June, 1856, failed, and become extinct, no such proceeding was capable of supporting or assisting anything done in or after June, 1856; and that as the necessary result of such a state of things, the proceedings against him subsequent to the year 1856, were altogether groundless and bad.

"We are not unaware of the inconvenience possible to arise from unavoidable delay between the issuing of a Commission and the making of a report under it, according to our reading of the Act; but neither can we avoid seeing the mischief, equal or greater, as we think, likely to arise, from holding that a penal suit may be instituted against a clergyman, founded on a report made twenty years before it. The Court of Queen's Bench possibly has, and possibly would exercise, the power of interfering, at the instance of an accused clergyman, in a case of long inaction, after the end of the fourteen days mentioned in the 8th section. That, however, is a point on which their Lordships think that they may well, and

ought to, abstain from intimating any opinion. It may be added, with reference to the Letters of Request mentioned in the 13th section, that if they can be issued without a Commission, but not after the two years, or if the suit in the Court of Appeal of the Province under the Letters of Request must be commenced within the two years, it is difficult (if not impossible) to conceive that it was intended that a private prosecutor or promoter, or even the Bishop of the Diocese, should be allowed an unlimited time for commencing a suit after a Commission and report. Construing the language of the Statute, as I have said, we feel somewhat less diffidence in differing from so high an authority as the learned Judge of the Consistory Court of London, than we otherwise should do, by reason of the early paragraphs (especially the second paragraph) of the opinion delivered at Bath by him, in favour of holding the Appellant not barred of his prosecution, by lapse of time.

"It seems to be a just inference that the learned Judge was precluded from taking time for deliberation; nor is this all that tends to diminish our self-distrust. There is the weighty Judgment now before us of that experienced and well-informed ecclesiastical lawyer, the present Dean of the Arches, and there are previous judicial opinions entitled to much consideration and respect, with which that judgment agreed: We may instance the cases of *The Bishop of Lincoln* v. *Day* (4 Notes of Cases, 290), and *Brookes* v. *Cresswell* (1 Roberts. Ecc. Rep. 606), and that of *The Bishop of Hereford* v. *T——n* (2 Roberts. Ecc. Rep. 595, where probably by the way, p. 605, the word 'issuing' should be 'serving'), respectively before Sir Herbert Jenner Fust and Sir John Dodson himself, to which, perhaps, may be added *Monckton's Case* (3 Notes of Cases, Suppl. p. liv.) before Dr. Lushington.

"For the reasons that have been now stated, it is their Lordships' intention to report to Her Majesty that, in their judgment, the present appeal should be dismissed, but without costs. Of course it is understood that upon the question of heterodoxy, the question whether the Respondent has at any time uttered heretical doctrine or committed any ecclesiastical offence, their Lordships have intimated no opinion."

POOLE *v.* THE BISHOP OF LONDON.

1861.

THE Members of the Judicial Committee who sat upon this Appeal were :—

LORD CRANWORTH.	SIR E. RYAN.
LORD CHELMSFORD.	SIR J. COLERIDGE.

The ARCHBISHOP of YORK (Longley) was also summoned to attend at the hearing.

[Revocation of a Curate's licence. The Judgment decides that there lies no appeal to the Judicial Committee of the Privy Council, under the statutes 25 Hen. VIII. c. 19, 2 & 3 Will. IV. c. 92, and 3 & 4 Will. IV. c. 41, from a decision of the Archbishop confirming the revocation by the Bishop of the licence of a stipendiary curate, under 1 & 2 Vict. c. 106, § 98.]

The Rev. A. Poole was licensed by the Bishop of London (Blomfield), in 1851, to the curacy of St. Barnabas', in the District Chapelry of St. Paul's, Wilton Place. In the winter of 1857–8, a considerable agitation having arisen on the subject of the practices said to be adopted by the clergy of that parish, and especially by Mr. Poole, and a complaint having been forwarded to the Bishop of London (Tait) by the Hon. and Rev. F. Baring, Mr. Poole was summoned to an interview with the Bishop at London House, on March 23d, 1858. After this interview, some time having elapsed on account of the Easter holidays, the Bishop of London wrote to Mr. Poole as follows, on May 8th :—

"London House, May 8th, 1858.

"Rev. and dear Sir,

"I have very carefully, and with a very earnest desire to do what is right, considered the complaint made against you by the Hon. and Rev. F. Baring, and the communications

which have passed between myself and you in connexion with that complaint.

"While I fully admit that the statements you have made to me tend to make me look with much suspicion upon the particular evidence laid before me, I regret to say that, quite independently of that evidence, I am led by your own admissions to regard the course you are in the habit of pursuing, in reference to Confession, as likely to cause scandal and injury to the Church. I feel, especially, that this questioning of females on the subject of violations of the Seventh Commandment is of dangerous tendency; and I am convinced generally that the sort of systematic admission of your people to Confession and Absolution, which you have allowed to be your practice, ought not to take place.

"Under the circumstances, I feel I ought to mark my sense of the impropriety of what you describe as your practice, and I shall therefore feel myself bound, though with great pain, to withdraw your Licence as Curate of St. Barnabas', and shall send you formal Notice accordingly.

"I earnestly pray that this solemn protest on my part against a course in which I believe you have departed from the spirit and practice of the Church of England, and assimilated your mode of dealing with your people too much to the system of the Church of Rome, may cause you to pause and reflect on the dangers to which such a course of action as you have adopted may expose both yourself and those over whom you exercise influence; and I trust you will allow me to add, that I shall at any time be glad to give you my best advice and assistance in the difficulties in which you are involved.

"I remain,

"Rev. and dear Sir,

"Yours faithfully,

"A. C. LONDON."

"Rev. Alfred Poole."

On May 11th Mr. Poole wrote to the Bishop, requesting to be allowed to defend himself, and begging that the charges against him might be drawn out more specifically. The

Bishop, however, replied that he considered that he had sufficiently specified the reasons which made him think it right to withdraw the licence; and, after receiving a further representation from Mr. Poole, sent, on May 18th, 1858, a formal document, which was as follows:—

"To the Reverend ALFRED POOLE, Clerk, B.A. licensed to perform the office of Assistant Stipendiary Curate in the Church of St. Barnabas, in the district chapelry of St. Paul, Wilton Place, in the county of Middlesex, and diocese of London.

"We, Archibald Campbell, Bishop of London, do hereby give you notice, that for a cause which appears to us just and reasonable, namely, that admitting females to confession, you address to them questions of a character calculated to bring scandal on the Church, it is our intention to revoke the Licence, dated the 26th day of September, 1851, granted to you by our predecessor, Charles James, late Lord Bishop of London, to serve the said Church as Assistant Curate. And in order to give you sufficient opportunity to show cause to the contrary, we appoint you personally to attend us for that purpose, at London House, St. James's Square, in the said county of Middlesex, on Saturday, the 22d day of May instant, at 10 o'clock A.M. unless you prefer at any time before that day, to show such cause in writing, under your hand, addressed to us at the same place.

"Given under our hand this 18th day of May, in the year of our Lord 1858.

"A. C. LONDON."

Mr. Poole thought it preferable to make his defence in writing. His letter, dated May 21, contained the following statement:—

"I have to acknowledge your Lordship's letter of the 18th instant, accompanied by a citation to appear before your Lordship on Saturday next, the 22d day of May instant, at 10 o'clock A.M. to show cause against your Lordship's threatened sentence of revoking my Licence, unless I prefer at any time

before that day to show such cause in writing under my hand.

"In obedience to your Lordship's command, I therefore proceed to address to your Lordship what appears to me to be necessary on my behalf.

"The ground upon which your Lordship intimates your intention to withdraw my Licence, is, that 'admitting females to Confession, I address to them questions of a character calculated to bring scandal on the Church.'

"This charge is made in general terms, and I do not know in what way I can meet it unless it be by a general, but a solemn and entire denial of its truth. I admit that when persons, male or female, have sought my ministry in Confession, I have put to them such questions as have been suggested by the matters confessed, which have appeared to me necessary, in order to enable me to give the 'counsel and advice' which the case required. But I solemnly assert that I have never put any questions of a nature, or in a manner, or in language 'calculated to bring scandal on the Church,' or otherwise, than was calculated to assist the penitent, and to enable him or her to receive more effectually the consolation or advice which, as the minister of the Church, it was my duty to impart. So far as the charge is general, I do not see how I can answer it more perfectly than I now do, unless it be to repeat what I have (in substance) told your Lordship already in my letter of the 11th instant, that I am ready to follow your Lordship's godly admonitions, if your Lordship will be kind enough to point out any particulars in which your Lordship thinks me to have erred, and to give me such instructions as shall enable me to conform my practice to the laws and spirit of the Church.

"But referring to the particular charges which have been brought before your Lordship by the Honourable and Reverend Mr. Baring, and to which your Lordship has already drawn my attention, I beg to remind your Lordship of my verbal denial of the charges made in your Lordship's presence, of the written statement which I had the honour to lay before you on the 22d day of April last, and of my two subsequent Letters, dated the 11th and 15th of the present month.

"In addition to what I have therein stated to your Lordship, and which I beg may be received as part of my present answer, I have to say, that in a charge so grievously affecting my character as the present, (may I add, one of the most serious that can be brought against a Clergyman), and calculated to bring so much scandal on the Church, I feel entitled to ask, (and your Lordship will, I hope, pardon me for saying that I ask it not as a favour but as a right, which every one is in every case entitled to), that my accusers may be brought before me, and that I may meet them face to face, and be allowed such assistance as I may require for my defence; and for this purpose I request your Lordship to allow me to be furnished with a statement in writing of the particular charges which I may be required to meet, and to assign a time when I may be heard by myself, or by my adviser, before your Lordship, and I may also adduce such evidence on my part as I may be advised. And I beg to ask your Lordship to give me the benefit of such an investigation of the charges made against me, as is provided by the Act of the 3rd and 4th Vict. c. 86, s. 3."

On the next day the Bishop replied as follows:—

"London House, 22d May, 1858.

"Rev. and dear Sir,

"I have carefully considered your letter, dated 21st May, which I received last night, and which I understand to be your formal answer to the Citation to appear before me this day, at ten o'clock, unless you preferred to show cause why your Licence should not be revoked, by sending to me a written statement. Your letter of the 21st, with your previous communications referred to in that letter, I take to be your defence, and I greatly regret that I do not, from what you have urged, feel myself exonerated from the duty of revoking your Licence.

"You request me, as I understand, in the last paragraph of your Letter of the 21st, to issue a Commission to try your case. I have, of course, during the long time that the matter has been before me, very carefully considered what manner of proceeding would be most for the interests of the Church, while it

was just to you; and I have thought that it was best to exercise that controlling power which a Bishop is entrusted with in dealing with the Curates of his diocese, to decide such matters personally, subject to an appeal to the Archbishop. I beg to assure you that I think you will be perfectly justified in exercising this right of Appeal, and any opportunity which you desire of having your case more fully stated would, in all probability, occur on such Appeal.

"I am bound to thank you for the expression of your readiness to follow my 'godly admonition,' and I indeed hope, that if the matter had to commence afresh, and you were entering on the duties of your cure, that you would conform your practice to what I should prescribe, but unfortunately it is with the past that we have now to deal; and I feel convinced, that taking upon yourself very difficult and delicate responsibilities, you have, in your way of meeting them, brought great scandal on the Church. And this it is which I feel calls upon me for the present painful step.

"I assure you most sincerely of my personal regard, and of my perfect willingness, if in any way at any future time you should again be labouring under my care, to give you my best advice and direction in all difficulties.

"Believe me to be,

"Rev. and dear Sir,

"Your faithful Servant,

"A. C. LONDON."

"Rev. A. Poole."

On the 25th of May the licence of Mr. Poole was revoked, in a document which runs as follows:—

"ARCHIBALD CAMPBELL, by Divine permission Bishop of London, to the Rev. ALFRED POOLE, Clerk, B.A.

"Whereas our predecessor, Charles James, Lord Bishop of London, did on or about the 26th day of September, in the year of our Lord 1851, by a Licence under his hand and episcopal seal, grant unto you his Licence to perform the office of Assistant Stipendiary Curate in the Church of St.

Barnabas, in the District Chapelry of St. Paul, Wilton-place, in the county of Middlesex, within our Diocese and Jurisdiction, and did assign unto you the yearly stipend, in the said Licence mentioned, for serving the said Cure: Now we, by virtue of the power and authority given to us in this behalf, by an Act of Parliament made and passed in the 1st and 2nd years of the reign of Her present Majesty Queen Victoria, entitled, 'An Act to abridge the holding of benefices in plurality, and to make better provision for the residence of the clergy,' and of all other power and authority vested in us, ordinary and episcopal, for sufficient causes us hereunto moving, do by these presents revoke, annul, and make void the said Licence. And we do hereby dismiss and remove you, the said Alfred Poole, from the office of Assistant Stipendiary Curate, in the Church of St. Barnabas as aforesaid, from the day of the date of these presents.

"Given at London House the 25th day of May, in the year of our Lord 1858, and in the second year of our consecration.

"As witness our hand and episcopal seal.

"A. C. LONDON." (L.S.)

Upon this Mr. Poole made his Appeal to the Archbishop of Canterbury (Sumner) under the Act 1 & 2 Vict. c. 106, sec. 98.[1]

The Petition of Appeal, after giving a history of the matter from the beginning, prays as follows:—

"That your Grace will be pleased to annul the said revocation of his Licence by the Bishop as aforesaid; and that your Grace will be pleased to appoint a time for the hearing of the Petitioner on the matter of the said Appeal; and that at the time so to be appointed by your Grace, you will be pleased to

[1] The words of the Act are: "Provided always, that any such Curate may, within one month after service upon him of such revocation, appeal to the Archbishop of the Province, who shall confirm or annul such revocation, as to him shall appear just and proper."

The whole section is not free from ambiguity. It begins by empowering a Bishop to license any Curate actually employed by a non-resident Incumbent without an express nomination, and then proceeds to enact that the Bishop, after giving "the curate" the opportunity of justifying himself, may revoke "*any licence granted to any Curate*," concluding with the words above quoted.

sit judicially and to hear him, the Petitioner, by Counsel, on the matter of the said Appeal, and to allow any witnesses to be examined *vivâ voce*, whether against the said Petitioner or on his behalf, for the following amongst other reasons:—

"1. Because, under the circumstances, the Revocation of the Petitioner's Licence by the Lord Bishop of London is unfounded and unjust.

"2. Because the Statements forwarded to the Bishop of London by Mr. Baring are in substance entirely and deliberately untrue.

"3. Because the Revocation of the Licence by the Bishop is grounded by his Lordship upon certain supposed admissions and confessions made by the Petitioner, which he has never had an opportunity of explaining, the language of which he does not know, the Bishop's understanding of which he does not know, and a copy of which, as taken down by the Bishop, has been refused him by his Lordship, so that the Petitioner cannot tell for what cause his Licence has been revoked.

"4. Because the Petitioner has never had sufficient opportunity given to him of showing cause why his Licence should not be revoked, his supposed admissions and confessions never having been distinctly stated, so that he knew not, and knows not now, what he is supposed to have admitted; and the Bishop having sent his own adviser to take evidence against him behind his back, and without giving him any notice thereof, and having refused to assign a time when he might be confronted with his accusers, and might be heard, and might adduce evidence before his Lordship, as requested in the Petitioner's letter of 21st May.

"5. Because he has always and *ex animo* accepted, and does now so accept, what he believes to be the law and doctrine of the Church of England, and does not desire, and never has desired in any respect to go beyond it, and believes *bonâ fide* that he never has in any respect gone beyond it in his practice.

"6. Because the notice to your Petitioner to appear and show cause before the Bishop was not served in such manner as is provided by the 112th section of the statute of the 1st & 2nd Vict. c. 106, before referred to.

"7. Because the Petitioner's personal character has been grievously attacked, and charges revolting in their nature, and derogatory to his position as a Clergyman, have been made against him, not only in the statements forwarded by Mr. Baring, as above mentioned, but also in the Citation of the Bishop of the 18th of May, hereinbefore set forth, wherein the Bishop accuses him of asking scandalous questions of women, although the Petitioner has always most solemnly denied, and does now most solemnly deny the same. And the Petitioner says, that it is just that he should have an opportunity of defending himself and clearing his character openly and before a Judicial Tribunal, and of testing the character of his accusers and examining their stories, all which has been hitherto denied him.

"8. Because grave doctrinal questions may arise on this Appeal; and it is just to the Petitioner and respectful to your Grace, that your Grace and your Grace's Vicar-General should be attended by counsel, to assist the Petitioner in a matter of vital importance to himself, and which without such assistance he is unable properly to conduct, and to aid your Grace towards the determination by your Grace of such questions.

"9. Because the course pursued by the advisers of the Bishop, both in withholding from the Petitioner any definite statement of his supposed admissions, and in assigning various indefinite and conflicting reasons for the revocation of the Petitioner's Licence, is exceedingly embarrassing to the Petitioner, and he is very desirous of legal assistance in the conduct of a case so difficult and complicated, and so important to the Petitioner.

"And your Petitioner will ever pray, &c."

The Appeal was presented on the 24th of June. On the 9th of July the Archbishop answered as follows:—

"Lambeth Palace, 9th July, 1858.

"Reverend Sir,

"I have considered very carefully the statements contained in your petition of appeal against the Revocation of your Licence, as Curate, by the Bishop of London, which you

have presented to me under the provisions of 1 & 2 Vict. cap. 106, s. 98.

"Under that statute the Bishop has power, after having given to the Curate sufficient opportunity of showing reason to the contrary, to revoke, summarily and without further process, any licence granted to any Curate, for any cause which shall appear to such Bishop to be good and reasonable.

"My duty, therefore, is to examine, in the first place, whether sufficient opportunity has been given to you of showing reason to the contrary. And I find that by a formal letter under the hand of the Bishop, dated 18th May, you were appointed personally to attend the Bishop for that purpose at London House on 22d May, unless you preferred at any time before that day to show such reason in writing under your hand; and that on 21st May, in obedience to the Bishop's letter, you addressed to him, in writing under your own hand, what appeared to you to be necessary on your own behalf.

"I have to consider, secondly, whether there has been good and reasonable cause for the revocation of your Licence.

"It appears from the statements in your formal reply of the 21st May, and in your letter of the 15th May, to which in your formal reply you refer the Bishop, that you have been in the practice of conducting a system of private Confession and Absolution amongst your people, and that the Bishop deemed such practice to be not authorized by the Church of England, and to be calculated to bring scandal on the Church.

"I concur with the Bishop in the view which he has taken of your practice in this respect, and therefore think it just and proper to confirm the Revocation of your Licence, and I confirm it accordingly.

"I am, Reverend Sir,

"Your faithful Servant,

"J. B. CANTUAR."

"The Rev. Alfred Poole,
"St. Barnabas' College, Pimlico."

A formal sentence confirming the Revocation of the Licence was signed by the Archbishop on the same day.

On November 23d, 1858, a Rule was obtained from the Court of Queen's Bench to show Cause why a Mandamus should not issue to the Archbishop of Canterbury, commanding him to make inquiry into the Appeal of Mr. Poole, according to the provisions of the Act 1 & 2 Vict. cap. 106.

The rule, after hearing, was made absolute, and was as follows:—

"Friday the Twenty-eighth day of January, in the Twenty-second year of the reign of Queen Victoria.

"IN THE QUEEN'S BENCH.

"Middlesex.—Upon reading the affidavit of John Bird, by Divine Providence Lord Archbishop of Canterbury, and upon hearing Counsel on both sides,—It is ordered that a Writ of Mandamus issue, directed to his Grace the Lord Archbishop of Canterbury, commanding him to make or cause to be made inquiry into the Appeal of the Rev. Alfred Poole, Clerk, and the matters complained of, according to the provisions of the statute of the 1st and 2d year of the reign of Her present Majesty, chapter 106, and to hear the said Appeal and decide the merits thereof.

"Mr. BOVILL for the Prosecutor.

"Mr. ATTORNEY GENERAL for the Defendants.

"By the Court."

In consequence of the Mandamus, the Appeal was heard by the Archbishop in February, 1859, at Lambeth, Dr. Lushington being his Assessor.

The Report made by the Assessor did not purport to criticise or review the discretion exercised by the Bishop of London upon the facts brought before him, but to test the mode in which it had been exercised by the ordinary principles of justice and the requirements of the Statute Law; thus leaving the matter free for the judgment of the Archbishop on the propriety of withdrawing the licence on the grounds alleged.

The Report was to the following effect: The Act 1 & 2 Vict. c. 106, s. 98, provides that "The Bishop shall have power, after having given to the curate sufficient opportunity of showing reason to the contrary, to revoke summarily and without further process any licence granted to any curate, and to remove such curate for any cause which shall appear to such Bishop to be good and reasonable, subject to an appeal to the Archbishop, who shall confirm or annul such revocation, as to him shall appear just and proper."

The curate then is to have an opportunity of showing reason against such revocation. But, since the manner of doing this is not prescribed, it must be taken to mean such opportunity of defence as common justice would require. "The Bishop is invested, subject to an appeal, with an unlimited discretion." But during the twenty years since the Act was passed there are very few instances in which this great discretionary power has been alleged to have been misused. The Bishop can also choose his own mode of proceeding, provided it is consistent with substantial justice.

1st. It is essential to justice that the accused person should know when an accusation is brought against him. Mr. Poole was informed of this in the letter of March 22d, 1858.

2d. It is essential that the accused person should know (where the proceedings are of the nature of inquiry) what is alleged against him. The grounds on which the Bishop intended to proceed are clearly set forth in the letter of May 8th, viz. not the evidence sent by Mr. Baring, but Mr. Poole's own admissions as to his practice in the matter of Confession.

3d. The matters alleged must be stated with sufficient precision. Not only does the Bishop state these matters clearly in his letters of May 8th, May 13th, and May 18th; but Mr. Poole, in his letters of May 15th and May 21st (the latter being his answer to a request for a formal defence), admits the facts on which the Bishop grounds his decision. He denies the matters asserted by Mr. Baring; but these had been put aside already. He requests to be confronted with his accusers; but the only accuser was the Bishop, who offered him an opportunity of personal explanation. He denies, very naturally, the inference

which the Bishop draws from his practice, but he admits the practices to which the Bishop objects.

As to the matter of fact, it appears as the admitted result of a review of the whole subject,—First, that Mr. Poole did not make confession a condition of admission to the Communion; that confession took place in the Sacristy, whether dark or otherwise; and that, as it was a place of passage, the doors were locked to prevent interruption. Second, that when women, who had sinned against the Seventh Commandment, came or were sent to Mr. Poole for confession or absolution, he did, in the Sacristy, at their own request, put certain questions to them respecting their violation of the Seventh Commandment, not in the gross language mentioned, but the questions were such as, in the opinion of the Bishop, would bring scandal on the Church.

The Report ended with a statement that the matter for the Archbishop's decision was now narrowed to the single question, whether the facts admitted afforded sufficient cause for the revocation of the licence; that, on the one hand, it was contended that Mr. Poole had acted justifiably, and as he was required to act; on the other hand, it was maintained that the course he had followed was not justified by the laws of the Church, and was contrary to her spirit and practice.

Upon this Report the Archbishop gave the following decision:—

"With the able assistance of my learned Assessor, I have given the merits and circumstances of this Appeal my most serious and careful consideration.

"I am of opinion, that the proved and admitted allegations afford, in the language of the Statute, good and reasonable cause for the revocation of this licence, and that the Lord Bishop of London has exercised a sound discretion in revoking the same.

"And I am further of opinion, that the course pursued by the Appellant is not in accordance with the Rubric or doctrine of the Church of England, but most dangerous, and likely to produce most serious mischief to the cause of morality and religion."

The revocation of the licence having thus been confirmed by the Archbishop, Mr. Poole presented a petition to the Queen in Council, claiming a right of appeal against the Archbishop's sentence. The petition was, according to the prayer contained in it, referred to the Judicial Committee of Privy Council.

Notice was given to the Bishop of London of Mr. Poole's intention to apply to the Judicial Committee for an inhibition and citation, to be issued by virtue of their appellate jurisdiction to the Archbishop and Bishop of London. To this, however, the Bishop made no reply.

On Feb. 20th, 1860, Dr. Phillimore, Q.C., appeared before the Judicial Committee on behalf of Mr. Poole, and moved, *ex parte*, that the inhibition and citation should issue, and that the appeal of Mr. Poole should be entertained. It was decided, that in order to allow the parties to argue the preliminary question of the admissibility of the appeal, and thus save the expense of proceeding to the appeal itself, notice should be given by the Registrar of the Privy Council to the Bishop of London and the Archbishop of Canterbury, in order that they might, if they thought fit, appear to dispute the question at this stage. The Bishop of London having declined to instruct Counsel to appear for him, the motion was renewed on March 7th, 1860, upon which occasion Lord Chelmsford pronounced the opinion of the Court, to the effect that their Lordships, not having had the advantage of hearing counsel against the right of appeal, and being unwilling to exclude the further consideration of the case, thought it proper to admit the Appeal, reserving, however, all question as to the competency of the appeal, and liberty to protest against it. On this a citation was issued to the Archbishop and the Bishop of London, being served upon the Registrar of the Court of Arches and the Secretary of the Bishop of London. The Bishop of London hereupon entered a protest, denying the jurisdiction of the Judicial Committee of the Privy Council in the matter stated in the citation; alleging that the act of revocation was an act not done by an Ecclesiastical Court or Judge, but by virtue of the Statute 1st & 2nd Vict. c. 106, from whence an appeal lay to the Archbishop in person only, and not to any Ecclesiastical Court or Judge, to confirm or

annul such revocation; that such appeal was in fact and in law made to the Archbishop, and personally tried and determined, by virtue of, and in accordance with that Statute only; that the Respondent, the Bishop of London, had notice only to appear or attend before the Archbishop at the hearing of the appeal, by a letter from His Grace's Secretary; that previous to such hearing, there were no pleadings or acts in Court; that at the hearing no minutes were taken or recorded, no depositions or affidavits read, or witnesses examined, and that no appeal from the sentence of the Archbishop is reserved or lies, under the provisions of the Statute 1st & 2nd Vict. c. 106, to Her Majesty in Council; and that neither Her Majesty in Council, nor the Judicial Committee, had any legal or Ecclesiastical Jurisdiction over the Archbishop or the Respondent, in the matter of the revocation of the licence, or any authority to entertain, hear, or determine the appeal.

This protest was supported by an affidavit from the Secretary of the Archbishop of Canterbury, who stated that he was present at the hearing of the Appeal, in pursuance of the *mandamus;* that the Appeal was heard by the Archbishop himself *in camerâ*, and not in any of the Archbishop's Courts, which were enumerated as follows:—(1) Court of Arches; (2) Court of Audience; (3) Court of Peculiars; (4) Commissary's Court of the Diocese of Canterbury; (5) Prerogative Court of Canterbury; (6) Court of Master of Faculties; (7) Court of Vicar-General of Canterbury; that there were no minutes, pleadings, or acts of Court brought in; that witnesses were not examined, but refused by the Archbishop, under advice, when offered; that there were no affidavits or depositions, but only the statements of the Appellant himself and of three other persons, not taken on oath; and that since he had been Secretary all appeals of this kind had been made in writing, and not *vivâ voce.*

The Queen's Advocate (Sir J. Harding) Mr. Montague Smith, Q.C., and Dr. Swabey, appeared for the Bishop of London; Dr. Phillimore, Q.C., Mr. J. D. Coleridge, and Mr. Bullar, for the Appellant.

It was argued, on the side of the Bishop of London, that no cause was pending. Who, it was asked, were the parties?

where was the record? Where was the evidence? What was the prayer? It was evident that the provision of 1 & 2 Vict. cap. 106, sec. 98 made the Archbishop's sentence final. The act of withdrawing a licence was not a judicial act, done in court, but an Episcopal act, like those of consecration, ordination, the granting or refusing of Lambeth degrees or special marriage licences. A discretion was lodged with the Bishop first, and then with the Archbishop. But if reference must be made to the Statute of 25 Hen. VIII. cap. 19, under which an appeal was claimed by the Appellant, it was evident that this Statute only applied to such appeals as were previously made to Rome. Whatever before belonged to the Archbishop belonged to him still; and the Statute did not affect the provisions of the Canon law by which the "Vicarius" could be removed by the incumbent or by the Bishop. The discretion of the Bishop remained unless expressly revoked by Statute, as was shown by several legal decisions (*Caudrey's Case*, 5 Co. Rep. f. 1; *Edes* v. *Bishop of Oxford*, Vaughan, 21; 1 Stephens' Eccl. Statutes, 161, note; *Rennell* v. *Bishop of Lincoln*, 3 Bingham, 256, 261, 271); and by Johnson's "Clergyman's Vade-Mecum" (1731), which says, "Licensed curates may be placed and displaced at the Bishop's discretion without any process of law." This discretion was confirmed by the Statute 12 Anne, stat. 2, ch. 12, which gave no appeal to the Archbishop. The appeal to the Archbishop was first given in 36 Geo. III. c. 83, repealed by 57 Geo. III. c. 99, secs. 69 & 74, which declares that the Archbishop shall determine the appeal in a summary manner. The Statute 1 & 2 Vict. c. 106, gives no new appellate jurisdiction, nor can such jurisdiction be created by the Court.

On the other side, it was contended that no Statute which gave an appeal to the Archbishop could be meant to take away the universal right of appeal in all Ecclesiastical causes given by 25 Hen. VIII. cap. 19, sec. 4. The matter was a judicial proceeding, and no distinction could be drawn between the Archbishop acting in person or acting in Court. The Canon law showed that the order of curates was recognized in the Church; if so, they must have the common right of appeal, unless it were taken away from them by express Statute or

Canon. Would it be contended that, if the decision of the Archbishop had been against the Bishop of London, he would have had no appeal?

Judgment was delivered on March 13th, 1861, by Lord Cranworth. It was addressed to the single question whether the appeal was admissible, and decided that there is no appeal to the Judicial Committee under 2 & 3 Will. IV. c. 92, and 3 & 4 Will. IV. c. 41, from a decision by the Archbishop confirming the revocation of the licence of a stipendiary curate under the provisions of 1 & 2 Vict. c. 106.

"The only question on which we have to pronounce an opinion in this case is, as to the right of Mr. Poole to appeal to Her Majesty from a sentence of the Archbishop of Canterbury, dated March the 23d, 1859, by which his Grace confirmed the revocation by the Respondent of the Appellant's licence as an assistant stipendiary curate in the church of Saint Barnabas, in the Diocese of London.

"The case was argued before us with great learning and ability; and our attention was directed to numerous ancient ecclesiastical authorities supposed to bear on the question. But, after giving the most careful attention to all which was addressed to us, we have come to the conclusion that the question turns, not on ancient ecclesiastical law, but on the true construction of, at most, two modern Acts of Parliament.

"It is not necessary to decide whether there were or were not in our Church before the Reformation functionaries corresponding precisely to the stipendiary curate of the present day. It is sufficient for the purpose of enabling us to come to a satisfactory conclusion, that we should see how far they have existed, and to what extent their rights have been recognised in modern times.

"That such a class of persons existed at the beginning of the seventeenth century, is plain from the Canons of 1603.

"The 47th Canon provides, that every beneficed clergyman licensed not to reside on his benefice, shall cause the cure to be supplied by a curate, that is, a sufficient and licensed preacher;

and the next Canon, the 48th, goes on to say that no curate shall be permitted to serve in any place without examination and admission of the Bishop in writing, under his hand and seal.

"Though, doubtless, there was by no means the same number of curates then as in modern times, yet it seems certain from these Canons that such an order of Ecclesiastics then existed; and this is made more plain by subsequent Acts of the Legislature.

"We are not aware of any Statute bearing directly on the point prior to the 12th of Anne, cap. 12, sec. 1. By that Statute it was enacted that, if any rector or vicar should present any curate to the Bishop to be licensed or admitted to serve the cure in his absence, the Bishop should fix his stipend at an annual sum not exceeding 50*l.* And in case of any dispute as to the payment, the Bishop should summarily hear and determine the same; and in case of non-payment he might sequester the profits of the living.

"This Statute shows clearly that in the reign of Queen Anne, curates, according to the modern acceptation of the word, were a class of Ecclesiastical functionaries commonly known and recognised in the Church.

"The next Statute to which it is necessary to refer is the 36th of Geo. III. cap. 83. The 1st section of that Statute, after reciting the Statute of Queen Anne, and that in many places the stipend thereby authorized was inadequate, authorizes the Bishop, in cases where the incumbent is non-resident, to fix the stipend at any sum not exceeding 75*l.* per annum, and to allow the curate to occupy the rectory-house. There are then some clauses putting, for certain purposes, perpetual curacies, and churches augmented under Queen Anne's Bounty, on the same footing as ordinary benefices. And then the 6th section proceeds thus:—'And whereas it is expedient that the authority of Ordinaries to license curates, and to remove licensed curates, should be further explained, enlarged, and confirmed, be it enacted and declared, that it shall be lawful for the Ordinary to license any curate who is or shall be actually employed by the rector, vicar, or other incumbent of any parish church or chapel, although no express nomination

of such curate shall have been made, either in words or in writing, to the Ordinary by the said rector, vicar, or other incumbent: and that the Ordinary shall have power to revoke, summarily and without process, any licence granted to any curate employed within his jurisdiction, and to remove such curate for such good and reasonable cause as he shall approve; subject, nevertheless, to an appeal, as well in the case of a grant of a licence to a curate who has not been nominated, as in the revocation of a licence granted to a curate; such appeal to be made in either case to the Archbishop of the Province, and to be determined in a summary manner.'

"By the 57th Geo. III. c. 99, so much of the Act of Queen Anne, and of the 36th Geo. III. c. 83, as relates to the maintenance of curates and to the fixing of their stipends is repealed, together with the whole of an intermediate Act, namely, the 53d of Geo. III. c. 149, which had contained provisions further extending the amount of stipend which might be assigned to them. This repeal does not touch the 6th section of the 36th Geo. III., inasmuch as that section does not relate to the maintenance of curates or the fixing of their stipend. This last Statute, the 57th Geo. III. c. 99, is wholly repealed by the 1st & 2d Vict. c. 106, except as far as it had repealed former enactments; so that the enactments now in force appear to be the 6th section of the 36th Geo. III. cap. 83, and the whole of the 1st & 2d Vict. c. 106.

"It is under this last Statute that the present appeal was presented, and it is necessary, therefore, to look closely to its provisions.

"The first seventy-four sections relate to matters foreign to our present inquiry; the 75th and 76th sections give power to the Bishop, when an incumbent is non-resident, to appoint a curate, and fix within certain limits the amount of the stipend. Sections 77 and 78 enable the Bishop, in certain cases, to appoint a curate even when the incumbent is resident, and does not consent to the appointment. Sections 81 and 82 point out the steps to be taken by any curate, in order to obtain the Bishop's licence, whether the incumbent be resident or not. Section 83 provides that, whether the incumbent is or is not resident, the licence shall state the

amount of the stipend; and if any dispute arises concerning the stipend or its payment, the Bishop shall summarily hear and determine it without appeal, and may, if necessary, sequester the profits of the living.

"Sections 84 to 94, both inclusive, point out the amount of the stipend to be allowed in different cases. Sections 95 and 96 regulate the mode in which a curate is to give up his cure and the rectory-house when a new incumbent is appointed, and in certain other cases. Section 97 forbids a curate to give up his curacy without a certain notice. Then comes Section 98, on which the present question arises: —'And be it enacted, that it shall be lawful for the Bishop to license any Curate who is or shall be actually employed by any non-resident incumbent of any benefice within his Diocese, although no express nomination of such curate shall have been made to such Bishop by the Incumbent, and that the Bishop shall have power, after having given to the Curate sufficient opportunity of showing reason to the contrary, to revoke, summarily and without further process, any licence granted to any curate, and to remove such curate, for any cause which shall appear to such Bishop to be good and reasonable, provided always that any such curate may within one month after service upon him of such revocation, appeal to the Archbishop of the Province, who shall confirm or annul such revocation, as to him shall appear just and proper.

"Acting on the authority conferred, or supposed to be conferred, by this section, the Bishop revoked the licence which had been granted by his predecessor to Mr. Poole. Mr. Poole duly appealed to the Archbishop, who confirmed the revocation.

"Does any appeal lie from this decision of the Archbishop? We think not.

"The argument on behalf of Mr. Poole was, that by the ancient law of the Church, as finally altered and settled by the Statutes, 24th Hen. VIII. c. 12, and 25th Hen. VIII. c. 19, there lay, of common right, an appeal from every decision of an Archbishop to the King in his Court of Chancery; and that by the recent Statutes, the 2nd & 3rd Will. IV. c. 92,

and 3d & 4th Will. IV. c. 41, s. 3, that appeal has been now transferred to the Judicial Committee of the Privy Council.

"By the 2d section of 24th Hen. VIII. c. 12, it is enacted that all causes testamentary, causes matrimonial, and causes relating to tithes, should from thenceforth be finally determined within this realm. And then, by sections 5 and 6, it is enacted, that in all such cases, namely, causes relating to testaments, marriage, or tithes, any of the parties grieved may appeal from the Archdeacon (if the matter or cause be there begun) to the Bishop; and if commenced before the Bishop, then from him to the Archbishop, there to be definitively determined.

"In the next year was passed the celebrated Act, commonly called The Act of the Submission of the Clergy, 25th Hen. VIII. c. 19, and by the 3d section of that Act, it is enacted, that no appeals whatever should be had to any authority out of the realm in any causes or matters whatever; but that all appeals, what cause or matter soever they might concern, should be had and prosecuted by the parties aggrieved after such manner as had been limited by preceding Statute in regard to causes of matrimony and tithes; and then by the 4th section it is provided, that parties grieved by any act of justice in any of the Courts of the Archbishop might appeal to the King in Chancery, who should thereupon direct his commission to the Delegates to hear and determine the same in the same way as in appeals from the Court of Admiralty.

"The power thus conferred on the Crown was, by the Statutes of the last reign, transferred to the King in Council, and is now exercised upon the advice of the Judicial Committee of the Privy Council.

"The argument of the Appellant was, that his case comes within the purview of these Statutes. The Statute 1st & 2d Vict. c. 106, gives him, he contends, a right of appeal to the Archbishop, and from him the Statutes of Hen. VIII. and Will. IV. give him a right of appeal to Her Majesty in Council and to the Judicial Committee.

"But we are of opinion that the provisions of the Statutes

of Hen. VIII. cannot be thus engrafted on those of the modern Statute.

"The appeals given by the Statutes of Hen. VIII. were appeals in matters and causes in contest, in which complaint was made of some violated right, where there was, in the ordinary acceptation of the word, litigation. But the case is very different, in the appeals given by the Statute under which the present question arises. The object of that Statute evidently is to authorize and compel the Bishop, for the benefit of the community, to exercise his discretion in a summary way on various matters in which it is necessary or expedient that a discretionary power should be lodged somewhere.

"Thus it may be reasonable, under special circumstances, to permit an incumbent to be non-resident. Circumstances may arise which may make it expedient to put an end to such a permission. It may be necessary to fix the stipend of a curate. Additional curates may be required for the sake of the parish.

"In these, and very many similar cases to which the Act extends, it is absolutely necessary that a discretion should be lodged somewhere, and the Legislature has confided that discretion to the Bishop. He is to determine whether there are circumstances which will justify the non-residence of an incumbent, or which make it expedient that a licence given to him for that purpose shall be revoked, or what amount of salary a curate ought to receive, or whether in certain cases additional curates ought to be appointed. He is to exercise, in these and the numerous other cases which the Act embraces, his discretion as to what ought, in the interests of the Church and of the public, to be done. But then the Legislature, seeing that in the exercise of that discretion the Bishop may err, has given to the party affected by what has been done or refused to be done, a right to appeal to the Archbishop, whose duty it still is to exercise his discretion, as it had been the duty of the Bishop.

"In a solitary instance, namely, the refusal by the Archbishop to grant a dispensation to hold two livings, a right of appeal is given to the Queen in Council by section 6. But in

that case the original discretion is exercised by the Archbishop and not by the Bishop, so that, unless there had been such an appeal given, there would have been no control over the discretion first exercised. The circumstance that in this one case an appeal is expressly given to the Queen in Council, is strong to show that where no such appeal is expressly given, it cannot be implied.

"The appeal given by the Statute from the Bishop to the Archbishop, and in the case mentioned from the Archbishop to the Queen in Council, is not an appeal as between litigant parties. It is a reasonable safeguard provided by the Legislature to prevent hardship from a hasty or erroneous exercise of discretion, and even if there were nothing in the Act excluding further appeal, we might reasonably have inferred that no such further appeal was contemplated; but all question on this subject seems to us to be excluded by the positive provisions of the Legislature. The 109th section is as follows:—'And be it enacted, that in every case in which jurisdiction is given to the Bishop of the Diocese or to any Archbishop under the provisions of this Act, and for the purposes thereof, and the enforcing of the due execution of the provisions thereof, all other and concurrent jurisdiction in respect thereof shall, except as herein otherwise provided, wholly cease, and no other jurisdiction in relation to the provisions of this Act shall be used, exercised, or enforced, save and except such jurisdiction of the Bishop and Archbishop under this Act; anything in any Act or Acts of Parliament, or law or laws, or usage or custom, to the contrary notwithstanding.'

"This section appears to us decisive on the subject; it excludes all proceedings not expressly authorized by the Act, and thus relieves us from all obligation of considering the numerous ancient authorities and principles to which we were referred.

"We will only add, with reference to the doubt suggested whether the 98th section of the Act extends to the case of the Appellant, he having been the Curate of a resident, not of a non-resident incumbent, that it is a point not material to be considered; for if the Appellant does not

come within that clause he certainly comes within the 6th section of 36th Geo. III. c. 83, to which the same principles apply.

"Their Lordships will, therefore, humbly report to Her Majesty that the appeal must be dismissed, no such appeal lying from the decision of the Archbishop; and we see no reason for departing from the ordinary rule, that it must be dismissed with costs."

BONWELL *v.* THE BISHOP OF LONDON.

1861.

THE Members of the Judicial Committee present at this Appeal were :—

THE ARCHBISHOP OF YORK.
THE LORD JUSTICE KNIGHT BRUCE.
THE LORD JUSTICE TURNER.
SIR JOHN TAYLOR COLERIDGE.

[The history of this case is fully detailed in the Judgment, which may be considered to establish the following points :—

1. Letters of Request need not disclose the fact that a Commission of Inquiry has found no *primâ facie* grounds for further proceedings upon certain charges brought against a clergyman.

2. Such charges may properly be included in the Articles, and proved by evidence, in support of other charges founded on the Report of the Commission. Upon this principle, facts which occurred out of the Diocese may be specified and proved to explain facts which occurred within it.

3. If alleged independently, even though they should be open to objection, as not founded on the Report (upon which the Court reserved its opinion), they will not vitiate other articles that are well laid, or invalidate a judgment based exclusively on the latter.

4. The 122d Canon, providing that no sentence of deprivation shall be pronounced in the Court of a Bishop "by any person whatsoever, but only by the Bishop, with the assistance of his Chancellor, &c." does not extend to the case of the Dean of the Arches Court.

5. The scandal arising from a moral offence committed by a clergyman, whether it be cognizable in the Temporal or in the Ecclesiastical Courts, is in itself a ground for the sentence, and the severity of that sentence must depend, in the discretion of the Judge, upon the gravity of the scandal.]

The following Judgment was delivered by Sir J. T. Coleridge, on July 18th, 1861 :

"This was an appeal against a Sentence of deprivation pronounced by the Dean of the Arches, in a suit promoted in

virtue of Letters of Request from the Lord Bishop of London. The Appellant conducted his case in person, and contended on several grounds that the decree ought to be reversed generally, or, at all events, that the sentence should be reduced to one of less severity.

"For the better understanding of these grounds, and the principle on which their Lordships' recommendation to Her Majesty will proceed, it may be convenient to state, in the first instance, what they consider to be the facts established by the evidence adduced in the Court below.

"It appears, then, that in October, 1858, Mr. Bonwell, a beneficed clergyman of many years' standing, and being a married man with a family, was at Margate alone, and there met at the house of a Mr. Robinson, Miss Elizabeth Yorath, who was on a visit at the house of a Major Watts, a gentleman resident at that place. The introduction which he thus obtained led to his calling on her at Major Watts' house. The acquaintance soon ripened to an intimacy; he paid her particular attentions, which were favourably received; he soon conducted himself towards her as an accepted lover, and it was understood in the family in which she was visiting, and among their acquaintance, that they had become engaged to each other. It does not appear precisely at what time he returned to London. Miss Yorath left Margate on or about the 1st of December in that year; she stayed some little time in London; attended services in the Appellant's Church, and on one occasion during that month was admitted into the vestry by his order; and did not return to Newport, where she and her mother resided, until the latter end of the month.

"Not long after her return, on the 22d of January, 1859, Mr. Bonwell came to Mrs. Yorath's house, on a visit to her; he announced himself to her mother, a blind lady, and to her brother, a surgeon, as Miss Yorath's accepted suitor; he was introduced as such to the friends of the family, and it was understood that the marriage was to take place in June or July, 1859. During this visit, and in several which followed in the spring of 1859, the manner of Mr. Bonwell and Miss Yorath to each other was that of engaged lovers; the family had entire confidence in his honour and morality, and without

restraint he and Miss Yorath were allowed to sit up alone, and they frequently did so to a late hour after the family had retired to rest.

"She left her home some months after, in consequence of pregnancy, which had become apparent. She went on the 8th of June to Margate, to the house of Major Watts, but, as might have been expected, left it on the 9th, her state of pregnancy being observed, and she not denying it.

"In that month of June, she came to the house of a Mrs. Glenney, in Ball's-pond Road, under the name of Mrs. Harvey, and took lodgings there; on being asked for a reference she gave Mr. Bonwell's printed card and address. When she took possession he came with her, and appeared on terms of intimacy, assisting her in her first arrangements. There she remained for some weeks, and left on the 22d of July; during this period she was seen by her landlady occasionally walking with him; she did not always sleep at home, and once was away for nearly a fortnight, and during this absence Mr. Bonwell, on one occasion, sent a man named Beilby to inquire for her letters, as for the letters of Mrs. Harvey. This man, on his return to Mr. Bonwell's house, found him and Miss Yorath there, and he introduced her to him as his cousin, Mrs. Harvey; Mrs. Yorath, her mother, was also there at the same time.

"During all this time, however, Mrs. Bonwell, who kept a school or college for young ladies, was absent; she returned on the 22d of July, unexpectedly, with her son and two of her pupils. Miss Yorath had gone not long before, leaving by mistake a parasol behind. The Appellant was not at home when Mrs. Bonwell arrived, and before his return she had discovered that a lady had been staying there in her absence; she taxed him with it on his return, and he stated that she was a Mrs. Harvey, a cousin from Australia, but this explanation was not believed; there was a quarrel, and he left the house for the night.

"Near to the Church of St. Philip is a school-house, with school-rooms, and a kitchen, bed-room, and parlour. These last had not been occupied from December, 1858, and were under the control of Mr. Bonwell, who had been often there

in the day-time, and occasionally slept there. On some occasions Miss Yorath was in this house, and once, in the month of July, 1859, she had let herself into it between ten and eleven at night by a key. In this bed-room, on the 11th of August, 1859, she was delivered of a male child. Mr. Bonwell sent for the nurse and for the medical man. For the twelve days that she remained there, he was in daily attendance in the bed-room on the mother and child; at the end of those days they were removed to the Sussex Hotel, in Southwark. Mr. Bonwell took the apartment, described the lady as being his sister, and paid the bill for their stay there. After a few days the child died, and Mr. Bonwell employed the undertaker and paid his charges for the funeral.

"In this summary their Lordships purposely omit some circumstances, not unimportant, connected with the stay at the Appellant's dwelling-house, because in regard to them there is some conflict in the evidence; they do not desire to express any dissent from the view which the Court below took of this evidence, but they prefer not to rely upon it.

"From circumstances attending the funeral of the child, which, however, do not reflect on the Appellant, a Coroner's Inquest was held, and this led to a Commission, issued by the Respondent under the Church Discipline Act. The report of the Commissioners found that there was room for further proceedings against Mr. Bonwell for having admitted or caused to be received in July or August, 1859, into an upper room, fitted up as a temporary sleeping apartment, in the school-house of the parish or district of St. Philip's, Stepney, and therein harboured a certain unmarried female named Elizabeth Yorath, then far advanced in pregnancy, in which room on or about the 11th of August, 1859, the said Elizabeth Yorath was delivered of an illegitimate child, and for having thereby caused great scandal to the Church: and also in respect of his conduct in relation to the said Elizabeth Yorath at the time of, and subsequent to, the delivery of the said illegitimate child, and in relation to its burial, and also in respect of his being the father of the said child; but the Commissioners found that there was no just ground for instituting further proceedings against him for having had

adulterous intercourse with her actually within the Diocese of London, on the ground that the evidence adduced could not in their opinion, warrant his conviction of that offence.

"Upon this finding, the Letters of Request were issued,[1] and Articles filed. The former prayed that a citation might issue to the Appellant to answer to Articles for the matters which had been found by the report as fit to be further inquired into, but were silent as to the matter respecting which it had stated that there was no ground for any further proceedings. The 13th and 14th of the latter charged the Appellant with the commission of adultery with Elizabeth Yorath on a Tuesday and on a Wednesday night in the month of July, 1859, in his own dwelling-house.[2] The Articles, after objection,[3] were admitted by the Dean of the Arches, with some slight verbal alterations, which did not affect the 13th and 14th. Many witnesses were examined *vivâ voce*, and cross-examined by the Appellant in person,[4] and, after time taken, the judgment now appealed against was pronounced.[5]

"Their Lordships have now heard the Appellant in person, both on the effect of the evidence, the admissibility of certain parts of it, and also of some of the Articles. On the two latter points they will presently express their opinion, but on the first they state at once their entire concurrence in the conclusion at which the Court below has arrived. They have listened with patience to everything addressed to them on this subject by the Appellant, who has exhibited great industry and cleverness; in these respects, and in entire freedom from embarrassment, his defence has suffered nothing by not having been entrusted to a professional Advocate; and their Lordships have thought it better to permit many things

[1] On the 2d of May, 1860.

[2] This charge was not supported by the Report of the Commissioners, and was not mentioned in the Letters of Request. The admission of it was therefore opposed by Mr. Bonwell, who contended that the Articles should be exclusively founded on the Report of the Commissioners.

[3] The Dean of the Arches refused the Appellant's prayer for permission to appeal on this point under 3 & 4 Vict. c. 86, s. 13.

[4] The Appellant called no witnesses on his own behalf.

[5] On the 29th of August, 1860.

to be said and produced, which in strictness were perhaps inadmissible: the Queen's Advocate, for the Respondent, not insisting on their exclusion; their Lordships mention this circumstance that it may not be drawn into a precedent. But, after all they have heard, they have no doubt whatever that the Appellant, long past the heyday of life, a clergyman, a husband, and a father, and specially bound by the strongest ties to a life of purity, has been guilty of seduction and adultery; and that in the pursuit of his wicked design he has deliberately and persistently represented himself to be a single man, has professed to be the honourable suitor of a single woman, so depriving her of the protection, even against her own passions, which the ordinary care of a mother and brother would have thrown around her, has polluted her by his embraces even under the maternal roof; that in the course of his guilty intercourse with her he has with many artifices admitted her to his own house, and given her access to the vestry of his Church, and the school-house adjoining it, and finally made the latter her place of refuge when the fruit of their guilty connexion was to see the light; by this whole series of acts, so soon as they became known, unavoidably creating the most just and greatest scandal and offence to his parishioners and the whole Church.

"Their Lordships will at present express no opinion as to the character of such conduct in such a man, under such circumstances, or the consequences which ought to result in the measuring out a discretionary punishment: they say only that, in their opinion, the learned Judge in the Court below could have come to no other conclusion but that the Appellant was guilty, to this extent at least.

"But it is necessary to consider the various objections in point of law which the Appellant has relied on in the course of his argument. He has complained, first, of the omission which we have noticed in the Letters of Request;[1] this complaint appears to their Lordships to be without the least foundation. It is the office of the Letters to present to the Court of Arches the subject of the future proceedings, that

[1] That is, the omission of any statement to the effect that certain charges had been found not proven by the Commission.

which is to form the matter of charge to be inquired into. To state matters over which the Judge is to exercise no jurisdiction would be simply irrelevant, and no hardship can ever result to a Defendant from the omission of such matters; for if it be material for his defence that the Judge should be informed that on certain other matters, not in charge, but more or less connected with those which are, the Commissioners have found that no sufficient *primâ facie* evidence was offered to them, it must always be in his power to bring that to his knowledge; and in the present case the Appellant cannot complain, because the learned Judge, in the exercise of his discretion, has proceeded as if a copy of the report itself had been regularly brought before him.

"There is as little foundation for the objection, which is next in order, that the Articles exhibited in the Court below go beyond the finding in the report of the Commissioners, and especially in charging two acts of adultery to have been committed in the Diocese of London. It is unnecessary for their Lordships to pronounce any opinion whether, in proceedings under the Church Discipline Act, the Court of Arches may entertain and adjudicate upon charges not reported by Commissioners as fit to be inquired into, for the point really does not arise in this case. The authorities cited before their Lordships, and in the Court below, do not appear to be entirely in unison, and many arguments of weight may be urged on either side. If ever a case should come before their Lordships, the facts of which make a decision necessary, it will be their Lordships' duty to lay down the rule; the facts will then be presented more precisely, and they will have the advantage of hearing the points argued at the Bar more fully than has now been done.

"But assuming the contention of the Appellant to be well founded, more than one answer now occurs: First, the insertion of an objectionable item of charge will not vitiate others well laid, nor can it form any valid ground of objection to the judgment where the Judge has confined himself to the charges which are well laid. Now, in this case the learned Judge in the Court below, who was evidently quite aware of the nature and weight of the objection, has carefully excluded from the

grounds of his decree any fact of adultery in London or elsewhere, and has limited himself to the charges to which the objection does not apply. A second answer is, that the report does charge the Appellant with being the father of the illegitimate child of which Miss Yorath was delivered; whatever, therefore, tended to establish the paternity was fit to be alleged before the Judge, and to be inquired into by him. The distinction is perfectly clear between what is matter of charge and what is evidence to prove it; had the paternity not been proved, the fact of adultery alone, however satisfactorily proved, could not have been made the ground of a decree against the Appellant, assuming his objection to be valid; still it was, like any of the other facts, lawfully to be used as evidence in order to prove the paternity, which was charged, and might therefore well be alleged by the Articles.

"And this reasoning equally disposes of the Appellant's next objection, that facts were allowed to be given in evidence which did not occur within the Diocese of London. Assuming the jurisdiction to be purely local, it cannot be more so than that of a Grand Jury sworn to inquire of offences committed within the body of their County, or of a Judge of Assize trying their presentments: the one cannot find, nor the other try (except under special Statutes in particular cases) offences committed elsewhere; but a crime committed elsewhere, even out of England, may, like any other fact, be a link in the chain of evidence to establish the specific crime committed within the County, and, if so, must, of course, be inquired into, but only as evidence. So here, all that occurred at Margate and at Newport was most material to establish the charges laid in the Diocese of London, and to give the true character to certain of the Appellant's acts in London, which without them might have admitted of an explanation, false indeed, but apparently consistent with his innocence.

"The Appellant's next objection is that the Dean of the Arches has no power to pronounce the sentence of deprivation, but that it can only be pronounced by some superior authority; whether in this case the Bishop of London, or the Archbishop, he was not prepared to say. His reliance was

on the 122d Canon,[1] and a doubt expressed by Sir John Nicholl in the case of *Saunder* v. *Davies* (1 Add. 291). The Canon, however, when examined, appears clearly to be applicable only to Bishops and to Diocesan jurisdictions. The doubt of so eminent a Judge as Sir John Nicholl must always be entitled to respect, but is of the less importance when it is known that, at least in one case, he himself afterwards pronounced the sentence, and that a case, *Burgoyne* v. *Free* (2 Hagg. Ecc. Reps. 456), which was much contested and much considered, and in which his decree was appealed to the Delegates and affirmed, and which was also in the Court of Queen's Bench, and in the House of Lords on a question of prohibition; where the objection would have been fatal and was not taken. In a much-considered case, that of *Kitson* v. *Loftus* (4 Notes of Cases, 350), his immediate successor, Sir Herbert Jenner Fust, pronounced the sentence of deprivation, which will be found at length in Coote's 'Ecclesiastical Practice,' p. 243. It purports to proceed entirely on the independent authority of the Dean of the Arches. Indeed, the practice of the Court of Arches as to this may now be considered as settled; and it is obvious that though abundant reason may be given why the rule of the Canon should be prescribed as to a Diocesan Court, in order that the same authority which conferred the cure of souls should alone be called upon to revoke it, there would be great difficulty in applying that rule to the Court of Arches, in which the Bishop has no jurisdiction. The Appellant has shown

[1] By the 122d Canon of 1603, it is provided that, "When any minister is complained of in any Ecclesiastical Court belonging to any Bishop of his province for any crime, the Chancellor, Commissary, Official, or any other having Ecclesiastical jurisdiction to whom it shall appertain, shall expedite the cause by processes and other proceedings against him; and upon contumacy for not appearing, shall first suspend him, and afterwards, his contumacy continuing, excommunicate him. But if he appear and submit himself to the course of law, then, the matter being ready for Sentence, and the merits of his offence exacting by law, either deprivation from his living, or deposition from his Ministry, no such Sentence shall be pronounced by any person whatsoever, but only by the Bishop, with the assistance of his Chancellor, the Dean (if they may conveniently be had) and some of the Prebendaries, if the court be kept near the Cathedral Church, or the Archdeacon if he may be had conveniently, and two others at the least, grave Ministers and Preachers, to be called by the Bishop, when the Court is kept in other places." See Stone's case, p. 353.

the greatest industry in the search for authorities, and yet no instance was adduced by him in which either the Bishop or the Archbishop had ever pronounced the sentence in person in the Court of Arches. Oughton describes the position and power of the Dean of the Arches in these very large terms:— '*Porrò, ille Officialis Archiepiscopi Principalis cum ipso Archiepiscopo, quoad jurisdictionem, æquiparatur: Dicitur enim, eandem esse Dignitatem, et idem auditorium Officialis, et Episcopi: Et in foro Judiciali, Parem esse Officialem Archiepiscopi ipsi Archiepiscopo: Quodque Officialis Principalis habet idem Consistorium cum ipso Archiepiscopo, tam in eis quæ competunt Archiepiscopo, jure Legati, quam in his quæ competunt, Jure Metropolitico.*' (*Ord. Judiciorum, Proleg.* xi.) In a Court of Appeal the authority of the decision appealed against, of course, cannot be invoked; but on a question of the practice of the Court it is impossible to hold for nothing the authority of the long-experienced Judge who now presides in the Court of Arches.

"Their Lordships may seem to have dwelt at unnecessary length on this point, but the distinction between the Chancellors and Official Principals of Bishops, and the Dean of the Arches, having been not always attended to, they have thought it right, once for all, to put an end to the doubt.

"Lastly, the Appellant contended that the Sentence of deprivation was invalid as without precedent; or if not formally invalid, yet was inequitable on the ground of extreme severity, and such as their Lordships should exercise their discretion upon, and mitigate to suspension. The first branch of this objection is founded on the Appellant's misconception of the nature of the offence for which the decree has been pronounced; he spoke of a single act of incontinence, and compared his case, so understood, with others where the Defendants had been guilty of a series of acts, or where other vices, such as drunkenness, gambling, or swearing, had become habitual. In some of these the present sentence, in others a lighter, had been pronounced. But the Appellant is not to answer for a single act; his Sentence is founded on the grave public scandal to the Church, the necessary consequence of his commission of the very gravest Ecclesiastical offences. The

scandal of criminal acts over which in themselves the Ecclesiastical Court has no jurisdiction, because cognizable only in the Courts of Common Law, is a well-known ground of deprivation; in such cases the guilt, or the conviction of the party in a Temporal Court, is matter of proof only, but the punishment is visited on the scandal, and it is, therefore, immaterial whether that results from one act or many, if it be grave, and a necessary consequence of the act upon its becoming known.

"In such cases the Ecclesiastical Judge is necessarily entrusted with a discretion; and, passing now to the second branch of this objection, their Lordships see not the slightest ground for interfering with the exercise of it, in this case, by the Court below. When the *corpus delicti* is once established, all the circumstances attending it are to be taken into account, in order to regulate the amount of punishment. Their Lordships have abstained hitherto from expressing their sense of the moral enormity of Mr. Bonwell's conduct, and they might have abstained still; but the application he makes, the character which he gives to his conduct, the bold tone which he assumes in his defence, the attacks which he makes on others, his imputations, utterly without foundation, on the motives and conduct of his Right Reverend prosecutor —above all, the unutterable baseness with which he seeks to throw the blame from himself on the unfortunate woman who, whatever may have been her weakness, is, at all events, the more pardonable and more suffering sharer of his guilt, make it their duty to express their opinion on this head; they are compelled to say, that it would have been difficult to sustain any judgment which should not have made it morally impossible for such a delinquent to return to those parishioners to whom he has set such an example, to whom his ministrations would be an offence and scandal—even his presence, shocking.

"Their Lordships are, at this stage, to draw the inference of reasonable minds from the evidence before them; it satisfies them that they have to deal with a Sentence pronounced on guilt of rare occurrence. They have been shocked to hear the Appellant's remarks on Miss Yorath; remarks, be

it observed, resting exclusively on the poor foundation of his own statement—remarks which, even if true, should never have proceeded from his mouth. But if they were true—if Miss Yorath were a too willing object of seduction, if she had even offered herself to his embraces, had he no safeguard against such a temptation, in his age, in his married state, in his children, in his professional character, in the vows which he had taken, in the ministrations he had to perform, the rites to celebrate? But this is only to give him his own case. The real facts show him deliberately and systematically availing himself of his being supposed to be in a condition to offer honourable love, and so invading the security of respectable families; deceiving all Miss Yorath's nearest relations; polluting one house in which he was received in most entire confidence by the commission of acts of adultery; making another, over which he had control only because he was entrusted with the spiritual education of the children of the District, first the scene of clandestine meetings, and then the place in which his illegitimate child was to be born. Of all who have heard his case, he seems the only one who is insensible to its real character; he has spoken, indeed, of repentance as a possibility which ought to leave open to him a return to his incumbency, and he has ventured to cite as apposite to his own case the memories of holy penitents who became the greatest and most useful of Saints; but he has come here in no spirit of repentance, apparently solely actuated by the miserable desire for restoration to the profits of his incumbency. To this, which would involve a return of himself, and a renewal of his ministrations in the very scene of his guilt, and among the parishioners who have been scandalized by his conduct, their Lordships cannot consent; and they will humbly recommend to Her Majesty that the Sentence be confirmed, and the appeal dismissed: the Appellant having been admitted to appeal *in formâ pauperis*, the confirmation of the sentence will be, therefore, without costs.'

HEATH *v.* BURDER.

1860, 1862.

THE Members of the Judicial Committee present were :—

On the Appeal from the Interlocutory Judgment. First hearing—

THE ARCHBISHOP OF YORK (Longley).	LORD JUSTICE KNIGHT BRUCE.
LORD KINGSDOWN.	LORD JUSTICE TURNER.
	SIR E. RYAN.

Second hearing—

THE ARCHBISHOP OF YORK.	LORD KINGSDOWN.
LORD CRANWORTH.	SIR E. RYAN.
LORD CHELMSFORD.	SIR J. T. COLERIDGE.

On the Appeal from the Definitive Sentence—

THE ARCHBISHOP OF YORK.	LORD JUSTICE KNIGHT BRUCE.
THE BISHOP OF LONDON (Tait).	LORD JUSTICE TURNER.
LORD CRANWORTH.	

[This case came three times before the Judicial Committee ; twice upon the allegation of insufficiency in the statement of the accusation, and once upon the merits of the case.

The Judgments on the question of the sufficiency of the accusation determine—

In a proceeding under 13 Eliz. c. 12, being a penal Statute, it is necessary that, besides the extracts from the writings of the accused person, the Articles of Charge should contain a statement of those portions of the Thirty-nine Articles of Religion which he is alleged to have contravened, and a specification of the unsound doctrine which he is alleged to have maintained.

But if a single distinct passage complained of contains a plain meaning, which can admit of no doubt, it may be sufficient to set it out, and state that it is directly contrary to such one or more of the Thirty-nine Articles as are conceived to be opposed to it.

The Judgment upon the merits of the case decides the following points :—

1st. It is immaterial, in a general charge of publishing false doctrine in sermons, whether the sermons were actually preached or not.

2d. The word "advisedly," in 13 Eliz. c. 12, s. 2, means not "intentionally," or "avowedly," but "deliberately."

3d. It is the duty of the Court in considering a charge of contravening the Articles of Religion, to satisfy itself, (1) As to the meaning of the Article

alleged to be contravened, (2) As to the meaning fairly to be put on the language of the accused person.

4th. It is not necessary, in order to bring a Clergyman within the Statute, 13 Eliz. c. 12, that the Court should distinctly comprehend the exact bearing of the whole of his opinions on the subject as to which false doctrine is imputed to him. It is sufficient that he should have propounded doctrine directly contrary to the doctrine laid down in the Articles.

5th. To obtain the benefit provided by the Statute (13 Eliz. c. 12, viz. the benefit of retractation), the clergyman accused must hand in to the Court a formal revocation of those parts of his published writings which have been adjudged heretical.

6th. A clergyman affirms doctrine directly contrary and repugnant to the Articles—

(*a.*) By maintaining that justification by faith is the putting every one in his right place by our Saviour's trust in the future, and that the faith by which man is justified is not his faith in Christ, but the faith of Christ Himself;

(*b.*) By maintaining that Christ's blood was not poured out to propitiate His kind and benevolent Father;

(*c.*) By maintaining that forgiveness of sins has nothing at all to do with the Gospel;

(*d.*) By maintaining that the ideas and phrases, "guilt of sin," "satisfaction," "merit," "necessary to salvation," "have been foisted into modern theology without sanction from Scripture, and do darken and confuse the clearest of the otherwise most intelligible and comforting statements of Holy Writ."]

The Rev. Dunbar Isidore Heath, the appellant, held the vicarage of Brading, in the Isle of Wight, on the presentation of Trinity College, Cambridge, of which he had been a Fellow. He published, in 1858, a small volume of sermons, called "Sermons on Important Subjects," which appear never to have been preached. The Bishop of Winchester, considering that the doctrine advanced in this book was inconsistent with that of the Articles of the Church, instituted a suit against the author, by Letters of Request to the Court of Arches, where Mr. Burder, Secretary to the Bishop, exhibited articles of charge in the beginning of 1860. These articles, fourteen in number, gave copious extracts from Mr. Heath's book, and declared, generally, that the passages so quoted were repugnant to the doctrine of the Thirty-nine Articles.

Objections were raised to the articles of charge by Mr. Heath's counsel, on the ground that they did not specify (1) what it was in these extracts that was contrary to the Thirty-nine Articles, nor (2) which of the Thirty-nine Articles were alleged to be contravened. The Dean of the Arches

(Dr. Lushington) ordered that they should be reformed, but only on the ground of the latter omission.

Accordingly, the articles were reformed by the addition to each extract of the statement that it was repugnant to certain Articles of the Church, of which the number and title were given, and the passages alleged to contain the doctrines impugned set out in a schedule, side by side with the appellant's statements on the same subjects.

This form of pleading being unprecedented, a fresh objection was taken to the articles of charge by Mr. Heath's counsel, on the ground that the actual doctrine said to be contained in the extracts from the book ought to be stated, in order that the appellant might know precisely of what he was accused, and also that, if he wished to retract, he might have his error pointed out to him.

Dr. Lushington, in an interlocutory judgment, delivered on the 25th of April, 1860, overruled this objection, holding that it was enough for the prosecutor to place the words of the accused in juxtaposition with those of the Articles, without further specifying the import of either, or the nature of their repugnancy to each other. This he considered to be the function of the Court, and he denied that any injustice could result from the want of greater precision. He, however, though with considerable hesitation, gave leave to appeal, on the ground of the gravity of the case; and the form of the pleadings was thus brought before the Judicial Committee.

On July 9th, 1860, Judgment was pronounced by Lord Kingsdown :—

"This case came before us on an appeal from an interlocutory order of the Dean of the Arches, in a cause of office promoted at the instance of the Bishop of Winchester against the Appellant, who is the Vicar of a parish within his Lordship's Diocese.

"The question for consideration is whether the articles exhibited against the Appellant state, with sufficient certainty, the offence with which he is charged, and are admissible, therefore, in their present shape. The learned Judge in the Court below is of opinion that they are sufficient. The order

being merely interlocutory, it was in the discretion of the Judge, by the Statute under which he acted, to give or to refuse liberty to appeal, and he determined, not without some hesitation, to grant this liberty.

"The Appellant prays 'their Lordships to report to Her Majesty in favour of the appeal and complaint of the Reverend Dunbar Isidore Heath, and that the decree, or interlocutory order, or sentence of the Judge of the Arches Court of Canterbury, appealed from, ought to be reversed; and that the articles in this criminal suit be ordered to be further reformed, so as to contain an exact and precise statement of those portions of the Thirty-nine Articles of Religion, which it is alleged that the passages from the Appellant's Sermons contravene; and also a specification, or statement, of the unsound doctrine or heresy which the Appellant is alleged to have advisedly maintained, and which he is called upon to revoke under the Statute, 13th Eliz. c. 12.'

"The articles thus exhibited appear to rest upon two distinct grounds of complaint; one, an alleged violation of the Statute, 13th Elizabeth, entitled 'An Act for the Ministers of the Church to be of sound Religion,' the other, an alleged violation of the Ecclesiastical laws, by publishing doctrines in derogation and depraving of the Book of Common Prayer.

"The Statute, 13th Elizabeth, c. 12, above referred to, after requiring that certain Priests and Ministers shall declare their assent, and subscribe to all the Articles of Religion which only concern the confession of the true Christian faith and the doctrine of the Sacraments, proceeds to enact, sec. 2, 'That if any person Ecclesiastical, or which shall have Ecclesiastical living, shall advisedly maintain or affirm any doctrine directly contrary or repugnant to any of the said Articles, and being convented before the Bishop of the Diocese, or the Ordinary, or before the Queen's Highness Commissioners in Causes Ecclesiastical, shall persist therein, or not revoke his error, or after such revocation eftsoon affirm such untrue doctrine, such maintaining, or affirming, and persisting, or such eftsoon affirming, shall be just cause to deprive such person of his Ecclesiastical promotions, and it shall be lawful to the Bishop of the Diocese, or the Ordinary, or the said Commissioners, to

deprive such person so persisting or lawfully convicted of such oftsoons affirming, and upon such sentence of deprivation pronounced, he shall be indeed deprived.'

"This, therefore, is an eminently penal Statute; a prosecution under it may result in depriving the offender of his benefice, and, possibly, therefore, may destroy all his means of livelihood.

"It is of the essence of justice, and is a principle fully recognised by the law of England, that a person indicted for a breach of the law shall be distinctly informed, before he is called upon to defend himself, of the nature of the offence with which he is charged.

"That the Courts of Common Law would apply this doctrine to offences of the nature of that imputed to the Defendant, if such offences came indirectly before them, may be inferred from *Specot's Case* (5 Co. Rep. 57), in which, on *Quare impedit*, the Bishop pleaded that he was justified in refusing to admit the Clerk, because on examination he found him to be an inveterate schismatic. It was held 'that the cause of the schism or heresy for which the prosecutor is refused ought to be alleged in certain,' and judgment passed against the Bishop.

"The cases cited at the bar seem to prove that the same rule is adopted in the Ecclesiastical Courts, at least in proceedings under the Statute of 13th Elizabeth.

"In the case of *Salter* v. *Davies*,[1] in the year 1692, in *Whiston's Case*[2] in 1713, in *The King's Proctor* v. *Stone*[3] in 1808, the particulars of the erroneous doctrines imputed to the Defendants, and the articles to which they were repugnant, were stated with great distinctness. The Defendants could have no doubt as to the error which they were required to revoke, and in the last case the Defendant affected to recant, though in terms obviously insufficient and evasive.

"The case of *Sanders* v. *Head*[4] in 1843, was not a proceeding under the 13th Elizabeth. The Defendant was charged with having maintained propositions in derogation and depraving of the Prayer Book, and the Court seems to have taken a distinction between the two classes of offences, and

[1] See Introd. p. lvi.
[2] See Appendix, p. 318.
[3] See Appendix, p. 348.
[4] See p. 30.

to have held that in the latter a great laxity is allowed; 'that when the general law Ecclesiastical is relied on, it is not necessary to plead specifically; that where the offence is one generally cognizable in the Ecclesiastical Courts, it is not necessary to point out the particular Canons or Statute on which the proceedings are founded.'

"Yet even here, though the same strictness of pleading may not be necessary, it is requisite that the accusation should show distinctly of what the Defendant is accused—a point upon which, in the case of *Sanders* v. *Head*, no doubt could exist.

"The case of *Hodgson* v. *Oakeley*, in 1845, was of the same description with *Sanders* v. *Head*. Mr. Oakeley did not hold any living, but was merely a licensed curate within the diocese of London. He was charged with having offended against the laws Ecclesiastical, by maintaining doctrines directly contrary and repugnant to the true usual literal meaning of the Articles of Religion as by law established, or one of them, and contrary to the laws, Statutes, Constitutions, and Canons Ecclesiastical of the realm, and against the peace and unity of the Church.

"It appeared by the pamphlet complained of, in the opinion of the Judge, that Mr. Oakeley 'held, without distinction, all Roman doctrine—everything that has been, and still is, maintained and taught by that Church.'

"Yet, even here, the very able Judge who decided the case, Sir Herbert Jenner Fust, seems to have doubted whether the articles contained a sufficient specification of the offence, and he states that he had expected to hear an argument by Mr. Oakeley's Counsel on the point. Mr. Oakeley, however, did not appear, nor could he with any colour of reason have pretended ignorance of the offence imputed to him. The ground on which the learned Judge held the charge sufficient was this—that there was no affirmance of any particular doctrine; Mr. Oakeley claimed to hold, affirm, and maintain all the doctrines of the Church of Rome, consequently it would be next to impossible to plead the charge in detail.

"That in whatever form questions of this kind arise, both the party accused and the Court before which they are brought have a right to require that the doctrine of the Church alleged to be impugned, and the doctrine of the accused which is

alleged to impugn it, shall be stated with sufficient distinctness to enable the one to frame his defence, and the other to discover from the pleadings what are the real points in controversy, is apparent from what fell both from the Dean of the Arches and the Judicial Committee in the Gorham case.

"That case was brought on by Act on petition, instead of by plea and proof. Sir Herbert Jenner Fust observes (in the Report of that case by Mr. Moore, page 135) that the proceeding ought to have been by plea and proof; that 'the Court would then have had the entire case brought clearly and distinctly to its notice, the doctrines of the Church of England upon which it was meant to rely on behalf of the Bishop would have been specifically and precisely stated, as well as those points of doctrine which it was said Mr. Gorham had impugned.' At the next page he observes, that 'the law ought to have been specifically pleaded, the law of the Church, the doctrines of the Church of England, and the points in Mr. Gorham's answers which are said to be contrary to those doctrines.'

"He afterwards complains that in consequence of the course which had been pursued, 'it being nowhere stated clearly and distinctly what the doctrine of the Church of England is, the Court had been forced to travel through the various questions and answers, and other particulars contained in the volume referred to, in order to ascertain for itself, as well as it could, what the doctrine of the Church of England was, and in what respects Mr. Gorham held opinions contrary thereto' (p. 137).

"When that case came before this Board, their Lordships entirely concurred in the observations which had been made in the Court below, and remarked, 'that the inconvenience was so great, and the difficulty of coming to a right conclusion was thereby so unnecessarily increased, that in their opinion the Judge below would have been well justified in refusing to pronounce any opinion upon the case as appearing on the pleading, and requiring the parties, even at the last moment, to bring forward the case in a regular manner by plea and proof' (page 461 [1]).

"It is obvious that the whole force of their remark depends

[1] See above, p. 88.

upon the assumption that if the case had been brought forward by plea and proof, the statement of doctrine on each side referred to by the Judge below would have been contained in it.

"Applying these principles to the case before us, we have to consider whether the articles give to the accused Clerk that distinct notice of the offences imputed to him which reason and authority alike require.

"Now the articles, after the mere formal pleadings, allege (article 6) that the Appellant wrote, printed, and published nineteen Sermons which are contained in a book described in the article. That in such book are contained certain passages, set out at length, and said to be taken from twelve different pages of the book; and they object to the Appellant that these passages 'do severally and together contain doctrines directly contrary and repugnant to the doctrines of the United Church of England and Ireland, as in the aforesaid Articles of religion contained,' and more especially to twelve of the Articles which they specify.

"They then 'object to him all and every other matter in the said book or pamphlet, or course of Sermons, contrary or repugnant to the doctrines of the said United Church of England and Ireland.'

"The succeeding articles of the libel, the 7th, 8th, 9th, and 10th, pursue exactly the same line, extracting long passages from different pages of the book, and alleging them to be contrary to certain of the Thirty-nine Articles, which they specify.

"Originally it appears that the libel specified none of the Thirty-nine Articles, and it was in substance merely an allegation that the passages in question were contrary to the Thirty-nine Articles.

"It appears to have been held by the Court below that this mode of pleading was too loose, and the learned Judge, therefore, required the Prosecutor to specify the particular Articles of the Church of England against which the Defendant was supposed to have offended, and this has been accordingly done; but it appears to their Lordships that it has been done in such a manner as in no degree whatever to relieve the Defendant from embarrassment as to the nature of the charge which he is called upon to meet.

"What may be necessary for this purpose must depend upon the circumstances of each particular case. If a single distinct passage complained of contains a plain meaning, which can admit of no doubt, it may be sufficient to set it out, and to state that it is directly contrary and repugnant to such one or more of the Thirty-nine Articles as are conceived to be opposed to it.

"In such a case the Defendant is fully apprized of the real nature of the charge. He may, if he pleases, insist that the proposition which he has maintained is not contrary to the Articles, or he may admit that it is so, and recall it.

"But the case is far otherwise when a number of passages are collected together, which enunciate no single definite proposition, which embrace a variety of topics, some extracts having to an ordinary understanding no meaning at all, and others expressed in language with respect to the meaning of which different guesses may be made by different minds.

"Take the first class of passages collected here in the sixth article. We presume that when they are explained by the context in which they are found, and the Court is assisted by the observations which will be made by the Counsel on each side, some distinct intelligible propositions will be educed from them, which will be argued on the one side to be in accordance with, and on the other to be in contradiction to, certain doctrines of the Church of England, as laid down in her Articles of Faith, and upon which the Court will be able to form an opinion. But we cannot say that this is the case at present.

"Then, is the matter mended by the reference to the particular Articles of Faith introduced by amendment?

"We cannot think that it is.

"Those Articles that are specified relate to a great variety of subjects. They are the 2d, 3d, 8th, 10th, 11th, 12th, 13th, 14th, 15th, 25th, 27th, and 28th.

"The 2d is entitled 'Of the Word, or Son of God, which was made very Man.' The 3d, 'Of the going down of Christ into Hell;' on the proper meaning of which Article we believe that some difference of opinion prevails amongst orthodox divines. The 8th, 'Of the Three Creeds;' as to which, again,

it may be observed, that a very great number of distinct propositions are contained in them, and with respect to some of which different interpretations have been given. The 10th is entitled, 'Of Free Will.' The 11th, 'Of the Justification of Man.' The 12th, 'Of Good Works.' The 13th, 'Of Works before Justification.' The 14th, 'Of Works of Supererogation.' The 15th, 'Of Christ alone without Sin.' The 25th, 'Of the Sacraments.' The 27th, 'Of Baptism.' And the 28th, 'Of the Lord's Supper.'

"Can it, with any reason, be said that a clergyman who is told that certain long passages extracted from his book, severally and together, contain doctrines directly contrary to these Articles, embracing such a great variety of propositions on subjects totally dissimilar from each other, has the slightest information afforded to him of what is the real complaint intended to be made against him?

"It is said that the Defendant can have no difficulty in knowing what is imputed to him, for that he must know the meaning of what he has preached and published. Assuming that he does know his own meaning, he has a right to know what is the meaning which the accuser imputes to him: that if the meaning be not his, he may repudiate it; if it be his, and he persists in it, he may attempt to justify it; or if he feels it to be erroneous, he may revoke it.

"It is said, again, the passages complained of are so confused, that the Prosecutor may be unable to say with certainty what is the true meaning. But the answer to this seems obvious. In order to convict the Defendant of maintaining false doctrines, the accuser must show what the doctrine complained of is. A man cannot contravene the Articles by writing stark nonsense. It is not denied that the false doctrine must be pointed out at the hearing, if it be not done now. The difference between doing it now and doing it then is this, that in the former alternative the Defendant will have an opportunity of judging whether he will defend himself or abandon his defence; and if he does defend himself, he will have the means of preparing for his defence.

"Their Lordships, for these reasons, are of opinion that the Appellant is entitled to a more distinct specification of the

charges intended to be brought against him, than he can find in the articles as they at present stand, and that, therefore, they must be further reformed, so as to contain a statement of those portions of such of the Thirty-nine Articles of Religion as it is alleged that the passages from the Appellant's Sermons contravene, and a specification of the unsound doctrine or heresy which the Appellant is alleged to have maintained.

"Their Lordships intend to reserve this case before them until this reformation has been made, in order that they may judge of its sufficiency; and when a sufficient reformation shall have been made, to remit it to the Court below, to proceed with the cause.

"They think that there should be no costs of this appeal. They will humbly report to Her Majesty their opinion, to the effect which they have thus expressed.

"It is proper to mention that the Archbishop of York, who sat on the hearing of this case, has seen this judgment, and that his Grace concurs in it.

In accordance with this judgment, the articles were reformed; but they were again objected to by the Appellant, on the ground that they were precisely the same as those previously appealed against, and that the judgment of the Committee had been disregarded.

The Appellant's Counsel moreover objected to the articles as reformed, as not being confined to the penal Statute, the 13th Elizabeth, c. 12, and the Thirty-nine Articles, but mixed up with other charges apparently intended to be founded upon the Statute of Car. II. the Act of Uniformity, and the Ecclesiastical Law relating to the Book of Common Prayer. The same authorities were cited and relied on, as had been urged in support of the former objections.

The following Judgment was pronounced by Lord Cranworth:—

"I may state first that, at the commencement of the argument their Lordships supposed that the order made had been an order that the articles should be reformed in a particular mode, namely, that they should be reformed in accordance

with the prayer of the Petition of Appeal. But we found, upon looking at the Order itself, as it was in fact drawn up, that we were under a mistake, and that although that was undoubtedly the opinion of the Court, the Order was only drawn up directing the articles to be reformed, and, therefore, although they do not contain any specification of the matters required in the petition, if we had thought that the form in which they were now drawn up was calculated to do complete justice, we might have held that the Order had been complied with; but upon fully considering this case, we think, that as this is a penal proceeding, it would be extremely reasonable that the articles should be reformed in the spirit and according to the direction which had been intimated in giving judgment upon the former occasion. Unfortunately, we are a little in want of a precedent to judge by, but there is one precedent, viz. the precedent of Dr. Stone's case, which happened fifty years ago before Ecclesiastical Judges and Practitioners of the highest eminence, and we thought that was our precedent, and that the party accused is entitled to call upon those accusing him for a specification of what it is that is complained of, in the same spirit as was done in Stone's case. In that case the articles expressly stated that Dr. Stone was alleged to preach in contravention of the Articles of the Church of England. It was distinctly set out that he denied the Divinity of our Saviour and other matters of a similar nature, and we think that, acting upon that precedent, and acting in conformity with what is the general rule in criminal proceedings; viz. that the Court will look to what was the distinct nature of the charge in order that it may be understood: we ought to direct a further reformation of these articles, and more particularly, because in these criminal proceedings, there is power, which, as far as I am aware, occurs in no other proceeding, to the party accused, of setting himself right by retracting that which is alleged against him.

"Therefore, the Order is, that the articles should be reformed by specifying the several doctrines alleged to be affirmed by the Appellant, contrary to any of the Articles of the Church of England. With reference to the costs of this proceeding, we think that the Appellant is entitled to have both costs,

and the articles must be reformed in accordance with this new order within a month. With regard to the suggestion of Counsel that we ought to dismiss the suit, on account of the delay in its prosecution, I may say that that is out of the question. There has been no laches, and if there had been, I do not think we could punish such laches, unless it had been very grievous indeed, by putting the party out of the reach of justice, even although the prosecutor had been negligent, but we do not think there was negligence at all here. The Order was made in June, and immediately after the long vacation the amendment was made."

The articles, having been further reformed to the satisfaction of the Committee, were returned, on March 19th, to the Court of Arches, where the case was argued on June 17th and 18th, 1861.

The first five and the last four of the articles of charge were purely formal. Of the five original articles which dealt with Mr. Heath's doctrine, one was struck out, viz. the 9th, which charged unsound doctrine relating to the righteousness of God and the infliction of punishment in a future state. The four articles imputing heterodox doctrine to Mr. Heath, which remained when the case was brought before the Court of Arches on the merits, were admitted without alteration. The portions of the Formularies which they were alleged to contravene, will sufficiently appear in the Judgments of the Court of Arches. But the extracts from Mr. Heath's writings,[1] cited in the articles, will not be before the reader sufficiently to enable him to appreciate those Judgments without somewhat fuller quotations than are supplied in the Judgments themselves. The following are a few of the passages which give most clearly the opinions of Mr. Heath on the four subjects on which his doctrine was pronounced unsound.

1. *Justification.*—In commenting upon the text in Psalm 130, "In His word is my trust," Mr. Heath says (Sermons, pp. 29, 30)—

"Now this word plainly means Christ, who is the Word of God,

[1] The extracts would occupy about sixteen pages of the present work if given in full.

or the way by which God speaks to us, to put away what is done amiss. 'Oh Israel,' David then goes on to say, 'trust in the Lord, for with the Lord there is mercy, and with him is plenteous redemption; and he shall redeem Israel from all his sins.' Clearly in this Psalm, then, David is preaching the Gospel, the Gospel of the remission of sins, the Gospel that by the righteous system of Christ the free gift is to come upon all men unto justification of life; for as by one man's disobedience the many were made sinners, so by the obedience of one shall the many be placed aright. The whole of society, men, women, and children, good men, bad men, and middling sort of men, shall all be placed exactly aright, by the work of one man, even Jesus Christ. This is justification, or the doing of strict justice to all. And how shall it be? how shall man be justified? By a great deal of hard work, which requires a great deal of faith! for indeed a hard task it is to put mankind exactly right. And whose hard work? Of course the hard work of Jesus Christ, which by his own personal faith he carries out; the hard work of marking what is done amiss, showing it and explaining it to us, and then not abiding it; showing us the evil of it, persuading us to avoid it, to dismiss it, and thus gradually introducing a plenteous redemption from it. We, on our part, must have the same sort of faith to accept the good offices of Christ; we must believe that he has an office and a work; we must trust in his word, and believe that there shall yet be a justification, a restitution of all things, a putting things right without laws, but by a spiritual method, a righteousness introduced by faith, not forced into the world by law. Of course, if we really do believe all this; if—I say if—if we believe in the work of Jesus Christ, and the faith of Jesus Christ, we shall do our part in helping him forward; and when society really sets itself to put all men exactly in their right places, they will find themselves wonderfully strengthened from above; they will find Christ among them before they know it, directing them. The great day of Christ will have arrived, and justification by faith will be carried out."

2. *Propitiation.*—At page 91 :—

"Propitiation by the shedding of blood, is one of the oldest institutions in the world. Now I am afraid it is a very common idea, that the glorious and great God and Father of mankind, all holy and all loving, was propitiated one thousand eight hundred years ago by blood, and is propitiated now, at this minute, by

our faith in this blood: I know not how to find words strong enough to express my abhorrence of this detestable doctrine. God is propitiated by Christ, but Christ's blood has long ago been poured out, not to propitiate his kind and benevolent Father, but to bring men up to his Father out of the system of law, which kept them away from the Father, and into the system of freedom, and spirit, and mercy, and grace, and faith which is pleasing to the Father. Christ is at this moment the propitiation not for our sins only, but for the whole world."

At page 419 :—

"I have myself heard the question addressed to a meeting of about twenty clergymen, 'From whom did Christ buy the Church?' (to redeem is to buy here,) and after a long pause, not one of them had an answer. I have also heard the same question addressed to some dissenting ministers, and with the same shameful result. If they answered, 'He bought us from God,' they know well that they should differ in opinion from the four-and-twenty Elders who fell down before the Lamb, and sang a new song, saying, 'Thou hast bought us to God.' And if they should answer, implying that he bought us from anybody or anything else but God, then all modern theology tumbles to bits, for it is all founded upon the statement, that God accepts the sufferings of Christ as a satisfaction or price due to his justice."

3. *Forgiveness and remission of Sin.*—Mr. Heath drew a distinction between these two terms, considering, apparently, that Forgiveness implied merely a benevolent feeling towards another, but that Remission involved a change of disposition in the person to whom it was granted.

In a passage quoted from pp. 161–2 he says :—

"I do not say that the whole mischief originally arose, but it is certainly perpetuated, from our unfortunate translation. For myself, I feel beaten to the very ground at the enormity of the task of persuading all England to reject, totally, the idea of forgiveness of sins as having anything at all to do with the Gospel. Yet the case is as clear as can be; the Greeks had one word, we have two, so half the times their word came in we put in our first word, and for the other half we varied it by introducing our second. That the two ideas corresponding to our two words are, in fact, just the contraries to each other, is evident enough, but nobody seems to care for such a small difficulty as this."

Again, in a passage from p. 166 :—

"And what is the use of this forgiveness after all? The faith and repentance are absolutely good things in themselves; they improve the man's whole being; they tend essentially to increase the man's power of carrying out God's designs; they enlarge the subjects of communion between the man and his Creator: but while they do all this, and because they do all this, they, in the same proportion, do away with any more place for forgiveness in anything present or future."

And further on, speaking of those to whom Christ forgave sin :—

"He told them generally to 'go unto peace,' or 'go in peace,' as we have falsely translated it. This false translation covertly insinuates that peace is the immediate necessary effect of being forgiven, it elevates forgiveness in accordance with our heathen traditions into an unscriptural importance in God's scheme. God's scheme is a scheme for remission, but no scheme at all is required for forgiveness, which may and must be assumed, as a matter of course, unconditionally. Take again our text, 'In whom we have redemption, through his blood, even the forgiveness of sins.' What has the mere forgiveness of sins to do with redemption? Simply and absolutely nothing. Supposing I forgive a man day after day; do I not rather hinder his redemption by confirming him in a habit of sin?"

4. The passage quoted in the Judgment (p. 243) will convey sufficiently the meaning of the extracts cited in the last Article of Charge imputing false doctrine.

Before the hearing (22d May, 1861), an allegation was brought in on behalf of Mr. Heath, to the effect that he had not, in any of the recited passages, maintained anything repugnant to the Articles, or repugnant to the Book of Common Prayer; and further, that, on the 2d of January, 1860, he had offered, in a letter to the Bishop, to revoke any errors which should be pointed out to him; but had received an answer, referring him to the articles for a specification of them.

During the argument, Mr. Heath's counsel handed in a paper, containing a solemn affirmation to a similar effect, denying that he had "advisedly" contravened the Articles;

and declaring that if, in the opinion of his Ordinary and the Dean of the Arches, he had done so in fact, he thereby expressed his regret and revoked his error.

On November 2d, 1861, Dr. Lushington gave his Judgment, of which the following is an epitome:

With regard to the principles on which a decision in such cases as this is to be made, I cannot look for help in the interpretation of the Thirty-nine Articles to the animus with which subscription is made; nor to the opinions of writers on those Articles, since these writers interpret them by reference to Scripture. The Articles must be construed judicially, and the plain principles on which I must proceed have been laid down in the Gorham judgment; viz. (*a*) there are many matters which have not been defined by the Church, and which must be left open; (*b*) if the Rubrics and Formularies clearly and distinctly decide any question, we must conclude that the doctrine so decided is the doctrine of the Church. The Court, therefore, must never assume either that anything is binding on the clergy which is not to be found in the Articles of Religion and Book of Common Prayer, or that anything therein found was not intended to have its full effect and operation. The Statute of 13th Elizabeth, in declaring that a doctrine to be condemned must be held advisedly, means, not that it must intentionally contradict the doctrine of the Church, but that it must be deliberately held, and actually repugnant to that doctrine.

Proceeding, then, to the articles of charge, I hold:

1. As to the doctrine of Justification, that the true interpretation of the 11th Article of Religion is, (1) that by Justification is meant being exclusively received into the favour of God; (2) that the merit of Christ is the cause of this reception; (3) that the condition is the faith of the recipient in the redemption of mankind through Christ.

Mr. Heath, on the contrary, holds that Justification is, as as it were, setting the world right; and though he declares this will be done by Christ, it is by the personal belief of the Saviour that it will, in his view, be done.

This is a new doctrine, which discards the conditions of the 11th Article, and substitutes another instead; it is the averment of a doctrine totally different and distinct. I think

it, therefore, contrariant and repugnant to the 11th Article of Religion.

2. As to Reconciliation, the doctrine of the Church is, that the death of Christ is a propitiation by which God is reconciled to man.

Mr. Heath declares that the blood of Christ was not shed to propitiate His Father.

3. As to Forgiveness, it is the constant doctrine of the Church, that those who believe and repent are forgiven for Christ's sake.

Mr. Heath says that he wishes "to persuade all England to reject totally the forgiveness of sins as having anything to do with the Gospel."

4. As to the theological terms, the use of which Mr. Heath condemns as darkening Holy Writ, the words "guilt of sin," "satisfaction," "necessary to salvation," are adopted by the Formularies, and are essential to the Articles in which they occur. To deny them, therefore, is to deny the Articles.

No explanation has been offered which in any way shows that Mr. Heath's opinions can be reconciled with the Articles; nor has any eminent divine been shown to have shared his views. Mr. Heath, therefore, must be condemned by the Articles imposed by law, and which the law alone can change.

A fortnight having been allowed to elapse from the passing of the judgment, to give Mr. Heath time to consider whether he would retract, he again appeared before the Court, November 16th, 1861; and his counsel proposed that the opposite party, or the Court itself, should frame a form of retractation. The Judge, however, declared that if Mr. Heath were disposed to retract, he should himself frame his retractation, and, on his refusal to revoke the passages articled, or to tender any form of retractation, pronounced the sentence of deprivation.

From this Mr. Heath appealed to the Judicial Committee, before whom his cause was heard in May, 1862.

Dr. Phillimore and Mr. Fitzjames Stephen appeared for Mr. Heath. Their argument was—that the proceedings against Mr. Heath, being founded exclusively on the Statute of Elizabeth, it was necessary that, according to that Statute, it should

be shown that the errors imputed had been held "advisedly;" which term implied an intention, such as was shown in the case of Mr. Stone, who acknowledged the repugnance of his doctrine to the Articles: that the sermons not having been preached, Mr. Heath's book must be read as a whole, and that its general object was not in any way to assail the Articles: that his views might be taken as free comments upon matters treated in the Articles; but that such freedom as this had been used by many great English divines: further, that the Court of Arches had not specified what was the false doctrine which it imputed to Mr. Heath, and had made it impossible for him to retract; for if he withdrew all the passages articled, he must withdraw many statements of unquestionable truth.

Dr. Twiss and Dr. Swabey, for the Respondent, argued that the Act of Elizabeth was not to be construed with the strictness of a penal statute, and that the term "advisedly," as therein employed, meant "deliberately" [the Court here expressed themselves satisfied on this head]; that the "holding doctrine repugnant to the Articles" was clearly proved against Mr. Heath, and that the fact that his views were very confused did not make them less contradictory of the Articles; that the "persistence" of which the Statute spoke existed, for no retractation had been made by Mr. Heath, such as implied a confession that his doctrines were contrary to the Articles, or that he revoked them.

Dr. Phillimore, in the course of his reply, handed in two papers, signed by Mr. Heath, which purported to constitute a sufficient retractation. They were as follows:—

"'Before the Judicial Committee of Her Majesty's Most Honourable Privy Council.

"'Heath *v.* Burder.

"'The Court of Arches having held that certain Sermons published by me, and forming the subject matter of these proceedings, contain doctrines contrary and repugnant to several of the Thirty-nine Articles of Religion, I, Dunbar Isidore Heath, the Appellant, hereby declare that I did not intend in

the said Sermons to maintain any doctrines contrary to those contained in the said Articles of Religion, wherein I sincerely profess my entire belief. I also express my great regret at having used language in my said Sermons which has misled my readers, and caused such a construction to be put upon them.

"'DUNBAR ISIDORE HEATH.

"'Doctors' Commons, London, E.C.
"'*March* 28, 1862.'"

"The second paper was as follows:

"'This is my opinion. Forgiveness is an attribute of God, irrespective of the Gospel. The Gospel contained the particular scheme by which this general attribute was brought into action.

"'DUNBAR ISIDORE HEATH.'"

Lord Cranworth, after consulting with the other Lords, said,—

"By the Statute under which these proceedings were taken, Mr. Heath could, if he pleased, revoke his errors; and the proceedings would in that case be necessarily and peremptorily stayed. But the course he had taken, through his Counsel, of merely expressing his regret, was not by any means sufficient. To obtain the benefit the Statute provided, he must hand in to the Court a formal revocation of those parts of his published Sermons which had been held to be heretical by the Dean of the Court of Arches, and on the ground of which sentence of deprivation had been pronounced against him."

Dr. Phillimore: Would it be sufficient for Mr. Heath to say, "I renounce the doctrine which it is judicially proved I have maintained?"

Lord Cranworth: That is not satisfactory—at least, speaking for myself.

The Archbishop of York and the Bishop of London, and Lord Justice Turner concurred.

The Lord Justice Knight Bruce: It does appear to me that if Mr. Heath is sincere in these two papers, he can sincerely and honestly give that detailed retractation or

revocation which Lord Cranworth has suggested. That is my impression.

Mr. Heath, through his Counsel, said he should decline a formal revocation, and their lordships decided that the case must proceed.

Dr. Phillimore then replied generally.

On June 6th, 1862, the Judgment was delivered by Lord Cranworth:—

"The question which their Lordships have to decide in this case is one of considerable importance;—namely, whether certain opinions and doctrines entertained and promulgated by the Appellant, a beneficed clergyman, are, or are not, directly contrary or repugnant to the Articles of Religion, and, therefore, such as to create a forfeiture of his living under the 13th Elizabeth, c. 12.

"It may be well to premise that the offence charged against Mr. Heath, though of an ecclesiastical character, is one strictly defined by Statute. He is accused of having, in violation of an Act of Parliament, propounded doctrine contrary to that laid down in certain of the Articles of Religion. In investigating the justice of such a charge, we are bound to look solely to the Statute and the Articles. It would be a departure from our duty if we were to admit any discussion as to the conformity or non-conformity of the Articles of Religion, or any of them, with the Holy Scriptures. The Statute forbids the promulgation of any doctrine contradicting the Articles. It leaves no discretion. All, therefore, which we have to do is, first, to ascertain, on the ordinary principles of construction, what is the true meaning of any of the Articles alleged to be infringed; next, what is the fair interpretation of the language used by Mr. Heath; and then, finally, to decide whether, by his language so construed, he has or has not put forward doctrine which contradicts the Articles.

"These are the principles of decision which the Dean of the Arches laid down, and we think most correctly laid down, as those by which he ought to be governed, and they must also guide us.

"That very learned Judge, in an able and elaborate judg-

ment, came to a decision adverse to the Appellant. He was of opinion that the volume of Sermons published by the Appellant does contain doctrine irreconcilable with several of the Articles of Religion; and, therefore, in obedience to the Statute he pronounced the sentence of deprivation, the Appellant having declined to revoke the errors which he had promulgated.

"From that sentence the Appellant has appealed to Her Majesty in Council under the Statute, 2d & 3d Will. IV. cap. 92. And the case was argued in the month of March last, before their Lordships, at great but not unnecessary length, and with very great ability. We have given to the case the best attention in our power, and we are now prepared to state the advice we propose to tender to Her Majesty.

"The charge against the Appellant is, that in, or since, the month of March, 1858, he wrote and caused to be printed and published a volume containing nineteen Sermons, in which he advisedly maintained and affirmed certain positions or doctrines directly contrary and repugnant to the doctrine of the United Church of England and Ireland as by law established, and especially to the Articles of Religion agreed upon in Convocation in 1562.

"In the argument before us a doubt was suggested whether these Sermons, or any of them, were ever preached. It is sufficient to say that there is no charge against the Appellant of having preached them, and, therefore, if that were material, which, however, we do not think it is, it must be taken that the publication charged is not a publication by preaching. The charge is a charge of publishing generally without indicating any particular mode of publication, and if any criminality would arise from publishing by preaching, greater than or different from what would be the consequence of publishing in any other mode, it must be taken that no such special criminality is alleged. For the purpose of this case, however, it does not occur to us that any such difference exists.

"It was also argued, that whatever may be theologically the merits or demerits of the volume in question, the Appellant cannot be said to have thereby advisedly maintained doctrines contrary to the Articles. It was contended, that

the use of the word 'advisedly,' in the Statute of Elizabeth, must be understood to show that the enactment was directed against those who avowedly rejected the Articles; those who not only maintained doctrine at variance with them, but did so with the intention of disputing their soundness. The learned Judge below refused to listen to any such argument, and we think rightly. The word is evidently used to show that what the Statute points at, must be the deliberate act of the party charged, not a casual expression dropped, to use the correlative term, unadvisedly. The word is used in the same sense as in the Statute, 9th & 10th Will. III. c. 32. On this point it is impossible to entertain a doubt.

"We come, therefore, to the substantial question in dispute. Do the passages complained of in Mr. Heath's Sermons contain doctrines directly contrary to the Articles of Religion as settled by Convocation in 1562?

"As the pleadings stood originally, Mr. Heath complained that the charges against him were stated in so vague and general a manner, that he was ignorant of the precise matter of accusation against him; and the question whether the pleadings stated the charge with sufficient distinctness, having, by leave of the Court below, been brought before their Lordships, they were of opinion, and reported to Her Majesty, that the articles ought to be reformed, so as to contain a statement of those portions of the Thirty-nine Articles which the Appellant's Sermons were said to contravene, and a specification of the unsound doctrine which he was alleged to have maintained. The articles were then reformed, but not, as their Lordships thought, satisfactorily. A further amendment was then made, and the Appellant did not oppose the pleadings as thus finally settled. It must be assumed, therefore, that the nature of the charge now appears with sufficient distinctness on the pleadings.

"Proceeding, then, as was done by the learned Judge below, with each charge separately, their Lordships will now follow the same course which he pursued. They must satisfy themselves first as to the meaning of the Article or Articles of Religion which in each charge is alleged to be contravened, and then as to the meaning fairly to be put on the language

of the Appellant complained of. If the doctrine propounded by the Appellant can be reconciled with that enunciated by the Articles of Religion, then he will not have brought himself within the provisions of the Statute of Elizabeth. But if the propositions put forward by him cannot, upon any reasonable construction of them, consist with the Articles of Religion, and, on the contrary, are repugnant to them, then the judgment of the Court of Arches must stand.

"There are four distinct heads of charge against the Appellant, each of which we will consider separately.

"In the first the charge is, that by certain passages set out at length, and which are contained in the third, sixth, fourteenth, and nineteenth Sermons, the Appellant advisedly maintained or affirmed doctrine directly contrary or repugnant to the 11th Article of Religion. That Article is in the following words:—

"'Article 11. "Of the Justification of Man." 'We are accounted righteous before God, only for the merit of our Lord and Saviour Jesus Christ by Faith, and not for our own works or deservings. Wherefore, that we are justified by Faith only is a most wholesome Doctrine, and very full of comfort, as more largely is expressed in the Homily of Justification.'

"The evident meaning of this 11th Article is, that man is accounted righteous, which, in the Article, is treated as the same thing as being justified before God, not for his own merits, but for the merit of our Saviour, by faith in Him; *i.e.* that man is admitted to the favour of God, not for his own works or deservings, but for the merit of our Saviour, and by faith in Him, *i.e.* by man's faith in our Saviour (howsoever faith is to be defined).

"The question is, whether the passages cited from the Sermons under this head of charge contain doctrine directly contrary or repugnant to that thus set forth in the 11th Article?

"The learned Judge below held that they do, and in this view their Lordships concur. It was suggested that the passages complained of have no meaning, and so cannot be treated as containing any doctrine at all, orthodox or unorthodox. Undoubtedly, if the passages contained no intelligible

proposition, they could not be described as containing doctrine contrary to the Articles. In such a case it would be impossible to say that they contained any doctrine. But after frequent examination of the passages in question, their Lordships cannot come to the conclusion that they are irrational in the sense of being incapable of having a meaning affixed to them.

"In the 3d Sermon, viz. that on the text, 'How then can man be justified with God?' the Appellant gives his explanation of the meaning of the word 'justification.' He says it means 'putting every one in his just place, or doing strict justice to all;' and the scope of the Sermon seems to be to show, that whereas this object, *i.e.* the object of justifying, or putting every one in his just place, is effected, or is attempted to be effected, where human laws are concerned, by inflicting penalties on those who are guilty of transgressions, the same end is or will be attained by our Saviour by spiritual means, by what Mr. Heath, speaking of our Saviour, calls His 'hard work,' which by His own personal faith He carries out.

"This same view of the subject pervades many of the other Sermons. Thus in the 6th he says:—'The plan of Jesus is a most merciful and just one to the whole world. It is the great plan of Justification, and Jesus believes His own Gospel. He has faith in it, and by that faith He will succeed in it. Justification by the faith of Jesus will make the whole world safe. It is the introduction of just and simple righteousness.'

"Again, in the 14th Sermon, he says:—'When I talk of justification by faith, I mean justification by our Saviour's trust in the future. The Saviour still trusts in our Father as He always did. He still has faith, and His faith still works by love. He still believes He can put the world right, and I believe so too.'

"The object of the last Sermon, the 19th, is to enforce very much the same views.

"Now, with the most sincere endeavour to find some interpretation to be put on these passages consistent with the 11th Article, their Lordships are unable to do so. The doctrine of the Article is, that our justification arises from the merits of our Saviour by faith, *i.e.* by the faith of man in our

Saviour and in His merits; whereas Mr. Heath first gives a new explanation of justification, which he thinks means the putting of every one in his just place; and this result he considers will follow, not from the faith of man in the merits of his Saviour, but from the faith of our Saviour Himself. He in many passages labours the point, that the faith leading to justification is not the faith in Christ, but the faith of Christ.

"Their Lordships cannot understand him otherwise than as rejecting the doctrine founded on the merit of our Saviour and our faith in Him.

"In the 19th Sermon he says:—'The inconsistency of modern theology is, indeed, most extraordinary; it first invents the word "merit," an unscriptural and incomprehensible word, which darkens everything.'

"He then goes into a long discussion on the meaning of the word 'merit,' and proceeds thus:—'Now, after inventing this disagreeable word 'merit,' the modern theologians go on to say, that nobody has any merit except Christ, but the nearest approach any one can make to this incomprehensible word merit, is faith. A man cannot have merit, but he can have faith; and if he have faith, God will act towards him as if he had merit. So merit, then, is at least something rather near to faith. And now comes the inconsistency; for people talk of the merit of Christ. We are justified for the merit of Christ. We are also justified by faith. Then why will not people allow it is the faith of Christ, if it is the merit of Christ?'

"It is surely impossible to hold that the word 'merit' is an unscriptural and incomprehensible word, which darkens everything, and that the faith leading to justification is not the faith of man in Christ, but the faith of Christ in His own work, without at the same time contravening the doctrine of the 11th Article, that man is justified solely for the merit of Christ, and by faith in Christ. Their Lordships do not feel bound to say that they distinctly comprehend the exact bearing of the whole of Mr. Heath's opinions on this mysterious subject. Perhaps his own views are not very distinct or clear, even to himself. It is sufficient for the present purpose

to say, that the doctrine propounded by him is not that contained in the 11th Article; it differs from it fundamentally, and is inconsistent with it.

"The first charge against Mr. Heath, therefore, appears to us to be distinctly made out, and we will only add further on this part of the case, that we find nothing in any other part of the volume which can be held so to qualify the passages we have referred to as to enable us to attribute to them a meaning different from that which is certainly *primâ facie* their import. We are aware that, in his fourth Sermon, p. 29, Mr. Heath has these words:—'We, on our part, must have the same sort of faith to accept the good offices of Christ; we must believe that He has an office and a work; we must trust in His word, and believe that there shall yet be a justification, a restitution of all things, a putting things right without laws, but by spiritual methods; a righteousness introduced by faith, not forced into the world by law.'

"But whatever may be intended to be the qualifying force of this passage, we cannot hold that either in it or in any other part of the volume is the effect of those other statements done away in which, as we have already pointed out, Mr. Heath has taught that the doctrine of justification by faith is something entirely different from what the Articles declare it to be.

"The next charge which the Appellant was called on to answer was, that by certain passages in the 8th, 9th, 15th, 18th, and 19th Sermons he had advisedly maintained and affirmed doctrine directly contrary and repugnant to that part of the 2d Article which is in the following words:—'Whereof is one Christ, very God and very Man, who truly suffered, was crucified, dead and buried, to reconcile His Father to us, and to be a sacrifice, not only for original guilt, but also for all actual sins of men;' and also directly contrary and repugnant to the 31st Article, entitled 'Of the one Oblation of Christ finished upon the Cross.'

"These two Articles are as follows:—'Article 2. "Of the Word or Son of God, which was made very Man." The Son, which is the Word of the Father, begotten from everlasting of the Father, the very and eternal God, and of one sub-

stance with the Father, took man's nature in the womb of the blessed Virgin, of her substance: so that two whole and perfect Natures, that is to say, the Godhead and Manhood, were joined together in one Person, never to be divided, whereof is one Christ, very God, and very Man; who truly suffered, was crucified, dead, and buried, to reconcile His Father to us, and to be a sacrifice, not only for original guilt, but also for all actual sins of men.' 'Article 31. "Of the one Oblation of Christ finished upon the Cross." 'The Offering of Christ once made, is that perfect redemption, propitiation, and satisfaction, for all the sins of the whole world, both original and actual; and there is none other satisfaction for sin, but that alone. Wherefore the sacrifices of Masses, in the which it was commonly said that the Priest did offer Christ for the quick and the dead, to have remission of pain or guilt, were blasphemous fables, and dangerous deceits.'

"Now, proceeding, as we are bound to do, to put a construction on the language of these Articles, there surely is no difficulty in saying that they lay down as clear doctrine that our Saviour suffered and died in order to reconcile the Father to us, whatever may be the exact import of that phrase, and to be a sacrifice for sin. And further, that this sacrifice thus made was a perfect propitiation and satisfaction for the sins of all mankind.

"Their Lordships know not how to reconcile with these Articles the following passage:—'I am afraid it is a very common idea that God was propitiated 1,800 years ago by blood. I know not how to find words strong enough to express my abhorrence of this detestable doctrine. God is propitiated by Christ, but Christ's blood has long ago been poured out, not to propitiate His kind and benevolent Father, but to bring men to His Father again.'—9th Sermon, p. 91.

"It seems to us that this passage directly negatives the doctrine of the Articles. We cannot understand Mr. Heath otherwise than as expressing his conviction that Christ was not crucified, dead, and buried to reconcile His Father to us, and to be a sacrifice for the sins of the world, and that the offering of our Saviour so made was not a perfect propitiation or satisfaction for the sins of the world.

"And if this be a correct interpretation of the words which Mr. Heath uses, it is unnecessary minutely to inquire what are his precise views on these abstruse points. If he maintains what amounts to this, namely, that the doctrine laid down by the Articles is unsound, that is, within the meaning of the Statute, maintaining doctrine directly contrary and repugnant to the Articles. It is unnecessary to inquire what are his own views, or whether he has any clear views of his own; he violates the Statute equally by maintaining a negative—that the doctrine of the Articles is wrong—as by affirmatively stating some heterodox position.

"We are bound to add, in reference to this as well as to the former charge, that the effect of the passage we have quoted is not destroyed or modified by any others we can find in other parts of the volume. There is, indeed, a passage in this same 9th Sermon (p. 87), in which Mr. Heath says of Christ, 'It was by His blood that He was a propitiation.' It is not for us to determine how this passage is to be reconciled with that which we have previously quoted. We are of opinion that the former is a direct contradiction of the Article; and nothing we can discover in other passages enables us to say that it is not a fair representation of Mr. Heath's views on this subject.

"This second charge, therefore, seems to their Lordships, as it did to the learned Dean of the Arches, to be clearly made out.

"The third charge is founded on several passages cited from the 16th Sermon, in which Mr. Heath is alleged to have maintained doctrines directly contrary and repugnant to the 8th Article, affirming the Apostles' Creed which declares our belief in the forgiveness of sins, and the Nicene Creed which declares our belief in one baptism for the remission of sins, and also contrary and repugnant to the 27th and 16th Articles. These Articles are as follows:—

"'Article 8. "Of the Three Creeds." The three Creeds, Nicene Creed, Athanasius's Creed, and that which is commonly called the Apostles' Creed, ought thoroughly to be received and believed; for they may be proved by most certain warrants of Holy Scripture.'

"'Article 16. "Of Sin after Baptism." Not every deadly sin willingly committed after Baptism is sin against the Holy Ghost, and unpardonable. Wherefore the grant of repentance is not to be denied to such as fall into sin after Baptism. After we have received the Holy Ghost, we may depart from grace given, and fall into sin, and by the grace of God we may rise again, and amend our lives. And, therefore, they are to be condemned which say, they can no more sin as long as they live here, or deny the place of forgiveness to such as truly repent.'

"'Article 27. "Of Baptism." Baptism is not only a sign of profession, and mark of difference, whereby Christian men are discerned from others that be not christened, but it is also a sign of regeneration or new birth, whereby, as by an instrument, they that receive Baptism rightly are grafted into the Church; the promises of forgiveness of sin, and of our adoption to be the sons of God by the Holy Ghost, are visibly signed and sealed; faith is confirmed, and grace increased by virtue of prayer unto God. The Baptism of young children is in anywise to be retained in the Church, as most agreeable with the institution of Christ.'

"The just interpretation of these Articles, taking the Creeds as incorporated with and forming part of them, is, so far as concerns our present inquiry, that in the Gospel dispensation are contained promises, on what conditions it is not necessary here to define, that God will forgive us our sins; that by baptism those promises of forgiveness are visibly signed and sealed; and that those who after baptism fall into sin may yet repent and obtain forgiveness.

"The whole of the 16th Sermon is devoted to the subject of the forgiveness of sins. It is entitled 'Forgiveness and Remission.' The text is from Colossians i. 14: 'In whom we have redemption through His blood, even the forgiveness of sins.'

"The whole scope of the Sermon seems to be, that there is not, and cannot be, in the Christian dispensation any such thing as a forgiveness of sins, using the word in its ordinary acceptation; that the word ought to be remission of sins, which Mr. Heath endeavours to explain as being something altogether different from forgiveness.

"Thus he says (p. 162):—'For myself I feel beaten to the very ground at the enormity of the task of persuading all England to reject totally the idea of forgiveness of sins as having anything at all to do with the Gospel. Yet the case is as clear as can be. The Greeks had one word, we have two; so, half the times their word came in we put in our first word, and for the other half we varied it by introducing our second. That the two ideas corresponding to our two words are, in fact, just the contraries to each other, is evident enough, but nobody seems to care for such a small difficulty as this."

"Again (p. 166):—'Did Christ come for the remission of sins, or for the forgiveness of sins? If He came for the remission of sins, He came to do a certain work, and a very difficult and glorious work.'

"And soon afterwards he proceeds:—'But if Christ came for the forgiveness of sins, and if repentance and faith are necessary conditions in order to secure this forgiveness, then only one in a thousand, or less even, of the human race, will be forgiven.'

"Again, at page 168:—"God's scheme is a scheme for remission, but no scheme at all is required for forgiveness, which may and must be assumed as a matter of course, unconditionally.'

"There is much more in the Sermon to the same purport; the object being, apparently, to show that forgiveness of sins does not, and, for some reason which their Lordships are unable to understand, cannot form part of the Gospel dispensation; that in lieu of forgiveness, we ought to substitute in our minds and belief the word remission. Their Lordships must here remark, as on the preceding charge, that it is not necessary, in order to bring himself within the Statute, that Mr. Heath should have propounded any intelligible heterodox doctrine. It is sufficient that he should have propounded doctrine directly contrary or repugnant to the doctrine laid down in the Articles, and this he appears to their Lordships clearly to have done. It is impossible, with every inclination to put as favourable a construction as possible on his language, not to perceive that he rejects totally the idea of forgiveness of sins according to the ordinary meaning of the word forgive-

ness, as having anything to do with the Gospel; whereas it certainly is in the ordinary meaning of that word that we are taught to say, in the Apostles' Creed, that we believe in the forgiveness of sins. And it is in the same sense that the 16th Article states, that 'they are to be condemned who deny the place of forgiveness to such as truly repent;' and that the 27th Article states 'the promises of forgiveness of sin to be visibly signed and sealed by Baptism.' It is true that the expression in the Nicene Creed is not 'forgiveness,' but 'remission.' It is evident, however, that the word remission is there used as equivalent to forgiveness. The one Baptism for the remission of sins, spoken of in the Nicene Creed, is that same Baptism by which the 27th Article states that the promises of forgiveness of sin are visibly signed and sealed. On these grounds we concur with the Court below in the conclusion that the third charge, like the two former, is fully established.

"The only remaining charge is one of a nature somewhat different from those which have already been considered. Mr. Heath begins his 12th Sermon as follows:—'The more I study the Bible for myself, the more astounding I find it, how many of the most fundamental ideas and phrases of modern theology have been foisted in, without sanction from that all-sufficing record of our religion. One after another, no less than about twenty ideas or phrases, such as guilt of sin, paying a penalty, going to heaven, going to hell, immortality of the soul, satisfaction, imputed righteousness, appropriating the work of Christ, necessary to salvation, and many others, have vanished from my system, because, as a minister of Christ, studying these matters professionally, I see them to be phrases and ideas not only absent from Scripture, but darkening and confusing the clearest of the otherwise most intelligible and comforting statements of Holy Writ.'

"The charge against Mr. Heath under this head, as we understand it, is, that some of the phrases and ideas which he thus repudiates, so form part of the propositions enunciated in the Articles that the rejection of the phrase and idea necessarily implies a rejection of the Article in which they are found. He cannot, for instance, reject, as something

which darkens and confuses the clearest statements of Holy Writ, the idea and phrase of 'guilt of sin,' without at the same time rejecting the doctrine contained in the 2d Article, that 'Christ suffered to be a sacrifice not only for original guilt, but also for all actual sins of men.'

"So the 31st Article expressly declares, that 'the Offering of Christ once made was a perfect satisfaction for all the sins of the whole world;' and it is impossible for any one holding that doctrine to reject, as tending to darken Holy Writ, the idea and phrase of 'satisfaction.'

"The 6th of the Thirty-nine Articles declares that Holy Scripture containeth all things necessary to salvation. How can any one be said to concur in that Article who rejects the idea involved in the phrase 'necessary to salvation,' as being calculated to darken and obscure Holy Writ? He cannot, as has been already stated under the first head of charge, reject the word 'merit' as unscriptural and incomprehensible, without at the same time rejecting the 11th Article, which declares that we are accounted righteous before God only for the merit of our Lord and Saviour Jesus Christ by faith. On all these points their Lordships think it impossible not to come to the conclusion that Mr. Heath has propounded doctrine incapable of being reconciled with the different Articles to which reference has been made.

"There are other expressions imputed to Mr. Heath as controverting the Articles which their Lordships think more doubtful; he rejects the phrase and idea 'immortality of the soul,' as not warranted by Holy Writ. Now, it does not appear certain that he may not mean, by rejecting this phrase and idea, merely to express his opinion that there is no warrant in Holy Writ for the doctrine of immortality as a quality necessarily inherent in the soul.

"So there are passages in Mr. Heath's Sermons, tending to show that when he rejects the phrases 'going to heaven' and 'going to hell,' he may not have meant to dispute the doctrine of everlasting life as it appears in the Creeds, but merely the language in which that doctrine is expressed when coupled with the word 'going;' and it is right to guard ourselves against the possibility of having in any point attri-

buted to Mr. Heath a meaning contravening the Articles which may nevertheless consist with them. All the Creeds distinctly enunciate a belief in everlasting life, and if this was intended to be rejected by Mr. Heath, it is needless to say he would be repudiating the most fundamental doctrines of our Church; but it would be unsatisfactory to rest our decision on his rejection of these expressions, 'immortality of the soul,' 'going to heaven,' or 'going to hell,' as it is possible that in using them he might have had a meaning not inconsistent with the Articles.

"Reviewing, therefore, the whole case, their Lordships decide that Mr. Heath has maintained and affirmed doctrine directly contrary and repugnant to the Articles.

"He has done so:—

"First. By maintaining 'that justification by faith is the putting every one in his right place by our Saviour's trust in the future, and that the faith by which man is justified is not his faith in Christ, but the faith of Christ Himself;

"Secondly. By maintaining that Christ's blood was not poured out to propitiate His kind and benevolent Father;

"Thirdly. By maintaining that forgiveness of sins has nothing at all to do with the Gospel;

"And fourthly. By maintaining that the ideas and phrases 'guilt of sin,' 'satisfaction,' merit,' 'necessary to salvation,' 'have been foisted into modern theology without sanction from Scripture, and do darken and confuse the clearest of the otherwise most intelligible and comforting statements of Holy Writ.'

"Their Lordships have had their attention directed to a letter addressed by Mr. Heath to the Lord Bishop of Winchester, on the 2d of January, 1860, in which he states that, if he has laid down any doctrine or position at variance with the Articles or formularies, he has done so unwittingly and in error, and in which he requests his Diocesan to point out in what respects he has done so, that he may correct whatever error he has fallen into. Another and more formal document has also been brought before their Lordships, in which Mr. Heath has stated that, if it appears to his Ordinary, and to the official Principal of his Grace the Archbishop of Canter-

bury, that his language does contain or teach a doctrine directly contrary or repugnant to any of the Thirty-nine Articles of Religion, he expresses his regret and revokes his error. Their Lordships desire to know whether Mr. Heath is now ready to act in accordance with these statements. They are unwilling to proceed to the last step in their duty, but unless he expressly and unreservedly revokes the errors of which he has been thus convicted, their Lordships have no course left but to advise Her Majesty to confirm the sentence of deprivation under the Act.

"At all events, Mr. Heath must pay the costs of this appeal."

Mr. Heath, in person, having stated to their Lordships that he had nothing to revoke, their Lordships agreed humbly to report to Her Majesty in the terms of the foregoing Judgment.

WILLIAMS *v.* BISHOP OF SALISBURY.

WILSON *v.* FENDALL.

1864.

THE Members of the Judicial Committee present at these Appeals were :—

THE ARCHBISHOP OF CANTERBURY (Longley).	THE BISHOP OF LONDON (Tait).
THE LORD CHANCELLOR (Westbury).	LORD CRANWORTH.
THE ARCHBISHOP OF YORK (Thomson).	LORD CHELMSFORD.
	LORD KINGSDOWN.

[These appeals brought to the test the limits of clerical liberty on important matters of the Church's doctrine. The following points were decided or affirmed by the Judgment :—[1]

1. The Court does not pronounce upon the general tendency of writings from which extracts are brought before it, but only upon the extracts themselves.

2. Proceedings under the Ecclesiastical Law for the correction of Clerks are of the nature of Criminal Proceedings, and it is necessary that there should be precision and distinctness in the accusation.

3. The Accuser is, for the purposes of the charge, confined to the passages which are included and set out in the Articles as the matter of the accusation;

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[1] In answer to a case laid before them by Dr. Pusey, and containing many questions as to the construction of the Judgment, the following opinion was given by the Attorney General (Sir R. Palmer) and Sir Hugh Cairns :

"We are of opinion, that the Judgments of the Privy Council, in the recent cases of Dr. Williams and Mr. Wilson, do not, by necessary implication, or otherwise, furnish the means of determining, in the abstract, any of the legal questions raised by the present case.

"We understand these Judgments merely as deciding, that, in those particular cases, there was no offence against the law pleaded or proved, unless the exact propositions, stated by the Lord Chancellor, could be deemed to be embodied in the formal and dogmatic teaching of the Church of England, so as to be rigorously binding upon every Clergyman : which they were held not to be. But it would be most unsafe, and, in fact, impossible, to attempt to

but it is competent to the accused party to explain from the rest of his work the sense or meaning of any passage or word that is challenged by the Accuser.

4. The Court cannot ascribe to the Church any rule or teaching which it does not find distinctly stated, or which is not plainly involved in, or to be collected from, that which is written.

5. The meaning to be ascribed to the passages extracted from the writings of accused parties must be that which the words bear, according to the ordinary grammatical meaning of language: and the writer cannot be held responsible for more than is directly involved in his assertions.

6. The Accuser having specified the portions of the Formularies which he thinks to have been contravened, the Court is confined to the consideration of these materials.

7. It is not penal in a clergyman to speak of merit by transfer as a fiction.

8. It is not penal in a clergyman to maintain that "the Bible is the expression of devout reason, and therefore to be read with reason in freedom," or that "the Bible is the written voice of the congregation."

9. It is not penal in a clergyman to deny the proposition that every part of every book of Holy Scripture was written under the inspiration of the Holy Spirit and is the Word of God, that proposition not being found in the Articles or Formularies of the Church.

10. There is not to be found in the three Creeds, the Absolution, and the Burial and Commination Services, any such distinct declaration as to require the Court to condemn as penal the expression of hope by a clergyman that even the ultimate pardon of the wicked who are condemned in the day of judgment, may be consistent with the will of Almighty God.]

The "Essays and Reviews" were published in February, 1860. The book contained seven Essays, six of which were

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derive, from these decisions, any rule for the determination of other hypothetical cases, each of which (if it should ever assume a practical form) must depend upon its own circumstances.

"This is the only answer which we can give to the questions proposed to us.

"ROUNDELL PALMER.
"H. M. CAIRNS.

"Lincoln's Inn, *June 7th*, 1864.

"P.S.—We understand the Lord Chancellor to have, in substance, founded his Judgments upon a negative answer to the inquiry, whether every Clergyman of the Church of England was strictly bound to affirm the two following propositions:

"'1. That every part of every Book of Holy Scripture was written under the inspiration of the Holy Spirit, and is the Word of God.'

"'2. That it is impious or heretical to entertain or express a hope, that even the ultimate pardon of the wicked, who are condemned in the day of Judgment, may be consistent with the will of Almighty God.'

"These are the 'exact propositions' referred to in our Opinion.

"ROUNDELL PALMER.
"H. M. CAIRNS."

written by clergymen of the Church of England. The subjects, and the names of the writers, were as follows:—

The Education of the World. By FREDERICK TEMPLE, D.D., Chaplain in Ordinary to the Queen; Head Master of Rugby; Chaplain to the Earl of Denbigh.

Bunsen's Biblical Researches. By ROWLAND WILLIAMS, D.D. Vicar of Broad Chalk, Wilts, and Vice-Principal and Professor of Hebrew, St. David's College, Lampeter.

On the Study of the Evidences of Christianity. By BADEN POWELL, M.A., F.R.S., &c. Savilian Professor of Geometry in the University of Oxford.

Séances Historiques de Genève. The National Church. By HENRY BRISTOW WILSON, B.D. Vicar of Great Staughton, Hunts.

On the Mosaic Cosmogony. By C. W. GOODWIN, M.A.

Tendencies of Religious Thought in England, 1688—1750. By MARK PATTISON, B.D.

On the Interpretation of Scripture. By BENJAMIN JOWETT, M.A. Regius Professor of Greek in the University of Oxford.

The following Advertisement, prefixed to the volume, was the only document explaining the object for which the writers had united, and for which they were prepared to be held responsible.

"TO THE READER.

"It will readily be understood that the Authors of the ensuing Essays are responsible for their respective articles only. They have written in entire independence of each other, and without concert or comparison.

"The volume, it is hoped, will be received as an attempt to illustrate the advantage derivable to the cause of religious and moral truth, from a free handling, in a becoming spirit, of subjects peculiarly liable to suffer by the repetition of conventional language, and from traditional methods of treatment."

The publication created much sensation, especially in the first instance, among the clergy; and before a year had passed, many protests and addresses had been circulated, and had received numerous signatures. A letter, signed by all the Bishops, both of the English and Irish branches of the Church, in answer to an Address, was published, in which disapprobation was expressed of certain opinions imputed to

the Essayists by those who had signed the Address; and public attention having been called to the book, it attained a very large circulation. The extent of this circulation may be measured by the fact, that the copy used by the Committee of Convocation, whose report was presented to the Lower House in 1861 (within sixteen months from the first publication) was one of the ninth edition.

The proceedings in Convocation, which were adjourned during the progress of the suits instituted against two of the Essayists, and were resumed after the Judgment had been pronounced, do not fall within the scope of this work. It will suffice to state that a Report was presented to the Lower House, on June 18th, 1861, containing copious extracts from the book, with references to passages of Scripture and portions of the Prayer-Book; and a motion was founded upon this to the effect that there were grounds for proceeding to a Synodical Judgment. The Upper House, however, postponed the matter, as it was thought probable that some of its members might be called upon to sit as Judges upon some of the questions referred to by the Report, in case of an appeal in the proceedings then pending before the Ecclesiastical Courts. Eventually, after the passing of Judgment by the Judicial Committee of the Privy Council, the question was revived, and a Synodical condemnation of the "Essays and Reviews" was passed by both Houses of Convocation in July, 1864.

The two prosecutions which resulted from these Essays, that of Dr. Williams by the Bishop of Salisbury, and that of Mr. Wilson by Mr. Fendall, though distinct cases, were in a great measure conducted together. The same course was adopted in all the proceedings by the two Defendants and the two accusing parties; the cases were heard separately in the Court of Arches, but Judgment was pronounced upon both cases together; and in the Privy Council the two Appeals were heard and adjudged together, the same counsel appearing for both Respondents.[1]

[1] Mr. Wilson, in his speech before the Judicial Committee, stated that he thought that the manner in which the two cases were disposed of in one judgment was prejudicial to them in the Court of Arches, and had thrown serious difficulties in the way of their Appeals.

The proceedings were not under the Statute of 13 Eliz. c. 12, under which Mr. Heath was prosecuted, but under the general Ecclesiastical law. The reason, at least on the part of the Bishop of Salisbury, for this course was, that, under the general Ecclesiastical law, the accused would, if the Articles were proved against him, not be debarred from a *locus pœnitentiæ;* whereas, by the Statute of Elizabeth, a clergyman deliberately maintaining doctrine which is adjudged to be unsound is immediately deprived.[1]

It was resolved in both cases that the charges should not be tried in the dioceses in which they arose, and letters of request, under the Church Discipline Act, were sent to the Court of Arches, from the Dioceses of Salisbury and Ely, bearing date respectively June 1st, 1861, and December 16th, 1861. The causes were heard as follows:—The case of Dr. Williams was heard on the 20th and 21st of December, 1861, and on the 7th to the 13th of January, 1862; Dr. Deane, Q.C. and Mr. Fitzjames Stephen appearing for the Defendant, and Dr. Phillimore, Q.C. and Mr. Coleridge, Q.C. with Dr. Swabey for the Prosecutor. The case of Mr. Wilson was heard on February 22d, 24th, and 25th, 1862. The same counsel appeared on both sides, with the exception of Mr. Coleridge. The arguments of counsel were necessarily of great length, the articles in each case being sufficient to occupy thirty-five closely printed octavo pages; and the speeches of Dr. Phillimore and Mr. Stephen, which were afterwards published, formed each a volume of considerable size.

Dr. Lushington, having postponed his decision, as stated by himself, till the case then pending of *Heath* v. *Burder* had been decided in the Privy Council, gave Judgment on June 25th, 1862. In this Judgment, which was in form Interlocutory, but in effect a full treatment of the merits,

[1] The Bishop of Salisbury gives this reason in his letter to the Archdeacons of his diocese, dated Easter-week, 1864, printed in the Appendix to his Charge of 1864, in which he also gives his reason for not trying the case in his own Court. "Having appended my name to the letter of the Archbishop, I thought it more advisable not to hear and try the case myself; and I much preferred to proceed under the general law of the Church, by which the Defendant, if found guilty, would not be deprived of a *locus pœnitentiæ*, as he would have been by the statute of Elizabeth."

the Judge rejected seven out of ten articles of charge in the case of Dr. Williams, admitted one without change, and ordered the two remaining articles to be reformed; in the case of Mr. Wilson he rejected five out of eight articles of charge, admitted one wholly, and ordered two to be reformed.[1] Leave, however, was given to both parties to appeal against this decision, and the whole case might thus have been brought before the Privy Council. The accused parties naturally had no wish to do this. The reasons which determined the promoters not to do so, are given by the Bishop of Salisbury in his letter to his Archdeacons, already quoted. He states that he had always entertained the strongest objections to the constitution of the present Court of Final Appeal, and that, when he had to consider what course he should adopt, his conviction as to that Court determined him not to reopen the whole case. His Lordship states in the same letter that he was deterred from adhering to the appeal with a view to increase the punishment awarded by the Court of Arches, because he did not wish merely to question the adequacy of that punishment; and that he therefore had no hesitation in declining to appeal, and in determining to do no more than endeavour to maintain the Judgment of the Court of Arches.

The reformed articles were brought in on September 12th, 1862, together with defensive allegations from Dr. Williams and Mr. Wilson, and the Dean of the Arches postponed his definitive sentence to December 15th. On that day counsel again addressed the Court on the merits of the cases, and a retractation was offered on behalf of Dr. Williams. By the final Judgment, Dr. Lushington, premising that nothing had been stated but what had been urged before, that the retractation was not such as he could admit, and that he must abide by his interlocutory Judgment, pronounced a sentence of suspension for one year upon each of the accused clergymen. From those sentences the appeals were brought to the Judicial Committee of the Privy Council.[2]

[1] An account of the articles preferred in these suits, and an analysis of the Judgment, will be found, p. 258.

[2] In the statement now to be made of the Interlocutory Judgment of

THE JUDGMENT OF THE DEAN OF ARCHES.

I. General Remarks applicable, with the exception of those contained under the first head, to both cases.[1]

1st. Dr. Williams's paper being a review of the book of Baron Bunsen, a preliminary question has to be asked in his case, How far has he maintained the opinions imputed to him?

It is necessary that the pleadings should set forth distinctly the opinions which Dr. Williams has maintained, and which are alleged to be contrary to the doctrines by law established. The preliminary question, then, must be answered, in order to determine what it is that Dr. Williams advisedly maintains.

It is necessary to point out the obligations imposed upon a clergyman in case of his reviewing a book containing unorthodox opinions. That he may review such a work and refute the opinions is obvious. The case of a clergyman, on the other hand, reviewing such a work, and expressing direct approval of the doctrines contained in it, is one not necessary to put. But what if a reviewer being a clergyman, after correctly stating unorthodox opinions of his author, does not refute them,—without either expressly refuting or condemning them, declares his general approbation of the book in which they occur? Approbation may be general or particular; it may be so general as to include everything not specially excepted. Under the circumstances, in order to draw a conclusion as to any particular part, the whole of the essay, as far as it can apply, must be taken into consideration. It is, further, not competent to the reviewer, when he either states or professes to give the substance of unsound doctrine from the work reviewed, to leave his own opinion in the dark.

Has Dr. Williams in effect adopted the opinions of Baron Bunsen referred to in the review as his own? His review proves a

Dr. Lushington, it is proposed—1st, to give an abstract of the general remarks with which it opens, and which are mainly applicable to both cases; 2dly, to give a short account of the rejected parts of the articles of charge, and of the decisions of Dr. Lushington upon each of them; 3dly, to set out in full the reformed articles, with the exception of those that are formal, giving the Judgment pronounced by the Dean of the Arches upon each.

By these means it is thought that the sifting process through which the articles of charge had to pass will be best exhibited, and the case presented to the reader in the shape in which it was actually brought before the Judicial Committee of the Privy Council.

[1] When the exact words of the Judge are given, they are put in inverted commas.

general but not indiscriminate approval of the opinions quoted, a general adoption with particular exceptions; and if there be parts as to which his approval is left in doubt, he is himself responsible for that difficulty.

2d. Have the opinions impugned been submitted to an illegal test, in the articles of charge, which cite extracts from the Bible as used in the services of the Church?

The issue before the Court is not whether Dr. Williams is sound or unsound in his theological views, but whether he has promulgated doctrines at variance with the doctrines of the Church as declared in the Articles and formularies. This is decided by the Gorham case. The Articles of Religion (by 13 Eliz. cap. 12) and the Liturgy (by 1 Eliz. cap. 2, and by the Act of Uniformity of Car. II.) are standards of doctrine. The Canons also, and Homilies are in some degree binding.

The Court can pay no attention to the general impression produced by the publication of "Essays and Reviews," since it is not a Court of Divinity but a Court of Ecclesiastical Law. Nor can it, except in certain special circumstances, pay attention to the opinions of divines, whose mode of reasoning is different, and not adapted to the decision of a legal question.

"The Articles of Religion, the Formularies and the Canons interpreted according to legal construction, are binding on the Clergy." If it be said that this obligation denies to clergymen the right of private judgment, this is not an objection which the Court can consider. At all events, what the law takes notice of is not the opinions that a clergyman holds in private, but the opinions which he advisedly maintains and promulgates.

"Again, it is objected that this authoritative imposition of doctrine denies to clergymen participation in the discoveries of science." "The Act of the Legislature proceeded on this basis: that for the purposes intended, the Church was in possession of all the truth, and that nothing in that respect remained to be discovered. Accordingly the Articles were framed, and all clergymen forbidden to impugn them." If, therefore, to put an hypothetical case, a scientific discovery were to be made which militated against some of the Articles, this Court would not, in such a case, be at liberty to discuss the truth or reality of the discovery. "The duty of the Court is to shut its ears to all such discoveries." It is bound by law so to do. The law must be obeyed, even in what

may be termed most extravagant circumstances .... The consequence may arise that discussions by the Clergy leading to truth may be excluded, but if such should be the case, and if it should be deemed to need redress, recourse must be had to the Legislature.

The law as to "open questions," of which much has been said, and as to the regard to be paid to "precedents of theological opinions," has been settled by the judgment in the Gorham case.[1] By that case it is established that all theological doctrines not determined by the Articles or Formularies are open questions.

A book like "Essays and Reviews" may contain much deserving of censure, and yet the law of the Church may not reach it. The present inquiry must be confined to that which is contained in the Articles and Formularies.

As to the writings of Divines, they can only be used in self-defence by the party accused; and, in order to constitute a precedent for the toleration of certain opinions, they must be shown to refer directly, not by inference, to the subject in hand.

The Articles and the Formularies are the legal tests of doctrines which are to be applied to the present case. The Court will look, first to the Articles, then to the Book of Common Prayer. The Articles are the primary matters for consideration, because their special object was to prevent diversities of religious doctrine. The Liturgy was not framed for such an object, but for devotional purposes. Hence the Court, having to try the charge of false doctrine based on the Liturgy, must exercise the greatest vigilance to see that the part of the Liturgy quoted is of a strictly dogmatical character. Subscription is made to the Articles in a literal sense, and the true construction of them is that which is laid down in the Gorham case: "The rules to be applied are the rules by law applicable to the construction of all written instruments. The consideration of external and historical facts is to be imported only so far as is necessary to understand the subject matter and the meaning of the words employed."[2]

But can reference be allowed on either side to the Bible? Where the allegation is a breach of the Article, the point is clear. In *Burder* v. *Heath*, the Judicial Committee lay down that "in investigating the justice of such a charge we are bound to look solely to the Statute and the Articles. It would be a departure from our duty if we were to admit any discussion as to the conformity or non-conformity of the Articles of religion or any of them with the

[1] See Gorham Judgment, pp. 91, 104. [2] Ibid. p. 90.

Holy Scriptures."[1] Though *Burder* v. *Heath* was a proceeding under the Statute of Elizabeth, the same rule applies in the present case, but in the present case the question as to the admissibility of the Bible as a test of doctrine arises, though in an indirect manner. For the Liturgy, *primâ facie*, includes part of the Bible, and the question therefore arises whether the Court ought to exclude from its consideration the Epistles, Gospels, and Lessons. It is, however, by no means clear that these parts of Scripture were inserted with a view to define doctrine. The Court would further, if tempted from the Articles and other parts of the Formularies, be "inevitably compelled to consider theological questions, not for the purpose of deciding whether they were conformable to a prescribed standard, but whether the positions maintained were reconcileable with Scripture or not." Against such a course the reasons are overwhelmingly strong. The exercise of such a power has been repudiated by the Judicial Committee. The Court will therefore "not be tempted to resort to Scripture as the standard by which the doctrine shall be measured. The Articles of charge must be reformed by striking out all reference to extracts from the Bible found in the Prayer Book."

3rd. Are the opinions maintained by Dr. Williams such as it is forbidden to a clergyman to hold and publish?

The question to be considered is the authority to be ascribed by the clergy to the Bible, and the limits within which the clergy are restricted in publishing opinions immediately connected with Holy Writ.

The doctrine established by law as to Holy Writ is contained first in the 6th, 7th, and 20th Articles of Religion, and secondly, in the following question and answer in the Ordination Service for Deacons: "Do you unfeignedly believe all the Canonical Scriptures of the Old and New Testament?" "I do believe them."

This question and answer may be taken first. The nature of the Old and New Testament must be borne in mind in considering the extent of the obligation imposed by the words, "I do believe." The Court hold that "the expression 'I do believe' must be modified by the subject-matter, that there must be a *bonâ fide* belief that the Holy Scriptures contain everything necessary to salvation, and that to that extent they have the *direct* sanction of the Almighty."

[1] P. 232.

As to the 6th,[1] 7th,[2] and 20th[3] Articles of Religion, these Articles declare that Holy Scripture contains all things necessary to salvation, that nothing *dehors* is needed, and that Holy Scripture is contained in the canonical books. "Canonical" books clearly mean those books whose Divine authority was never doubted in the Church. The expressions, "God's word written" and "Scripture" are identical, and, though it is true that the Church has nowhere defined inspiration, "I must put a construction upon the Articles, and I hold that in the phrases 'God's word written,' and the 'Holy Scripture containeth all things necessary for salvation,' it is necessarily implied that the Holy Scriptures emanated from the extraordinary and preternatural interposition of the Almighty," "as their cause and origin." "I must hold, therefore, that any clergyman who advisedly maintains, whether in direct or indirect language, that the Holy Scriptures proceed from the same mental powers as have produced other works, or *vice versâ*, even with the qualification that these powers differ in degree in the one case and in the other, impairs the Divine authority of Holy Scripture, does, in fact, maintain that the Bible is not God's word written, but is the work of man, and thereby contravenes the 6th and 20th Articles of Religion."

As to the right of criticism, that is, the examining and determining the text of Scripture, no legal authority or precedent is to be found. Learned divines of undoubted orthodoxy have held that certain verses or parts have been erroneously introduced, and are not entitled to keep their place in Scripture. The law would not hold persons coming to similar conclusions guilty of any ecclesiastical offence, though "I exceedingly doubt if this liberty can be extended beyond the limits mentioned, viz. certain verses or parts of Scripture. I think it could not be permitted to clergymen to reject the whole of one of the books of Scripture," the 6th Article having declared that all the enumerated books are canonical.

As to what are the books which the 6th Article enumerates as canonical, "the view of the Church was, that for all practical purposes the Article and the list of the enumerated Books referred to the version then authorized, or the versions which might be authorized in future times."

[1] Of the Sufficiency of the Holy Scriptures for Salvation.
[2] Of the Old Testament.
[3] Of the Authority of the Church.

II. An Account of the Rejected Articles of Charge with the Reasons given by the Judge for their Rejection.

(i.) Dr. Williams' Case.

Part of Art. 7.—In passages quoted from "Essays and Reviews," pp. 82, 83, Dr. Williams speaks of the affinities to Christianity existing in the human mind before Christianity came, and the necessity of a "verifying faculty" in judging of Scripture. These passages were asserted to contradict not only the 6th, 7th, and 20th Articles of Religion, which were allowed to stand in the reformed articles of charge, but the Epistle for Christmas Day (Heb. i.) the Epistle for the Epiphany (Ephes. iii. 1, &c.), both of which were quoted at length, and also the Preface for Whit-Sunday in the Communion Service.

On this charge the Judge said: "What is the true meaning of these words (verifying faculty)? I apprehend it must mean this: that the clergy (for I speak of these only) are at liberty to reject parts of Scripture upon their own opinion that the narrative is inherently incredible, to disregard precepts in Holy Writ, because they think them evidently wrong. Whatever I may think as to the danger of the liberty so claimed, still if the liberty do not extend to the impugning of the Articles of Religion or the Formularies, the matter is beyond my cognizance.

"I disclaim referring to the passages of Scripture also pleaded."

Art. 8 quoted passages from p. 67 to 74, describing the moral element of prophecy as gradually superseding, in the writings of divines, the predictive element, and showing in what sense Dr. Williams held the prophecies to be Messianic. These passages were charged as allowing scarcely any divine prediction of persons or events.

Dr. Lushington, after describing the opinions of Dr. Williams, said, that this opinion, though contrary to that commonly received in the Church, was not contrary to the formularies adduced. "I cannot find in the Article quoted," he said, "any direct mention of Messianic prophecy; and it was not denied by Dr. Williams that the Holy Ghost spake by the prophets. The Nicene Creed does not say that the subject of what the Holy Ghost spake by the prophets was the Messiah."

Art. 9 related to Jonah and Daniel. (Pp. 76, 77.) It alleged that Dr. Williams maintained that the Book of Daniel was not written by the Prophet Daniel, and that Jonah was not a real

historical person; and that this was contrary to the Declaration in the Deacon's Ordination Service.

After specifying the points asserted in the passage about Daniel, Dr. Lushington said: "All this may be wholly erroneous. But what Article is contravened? I cannot in the 6th Article of Religion find any condemnation of the passage quoted, nor do I see any repugnance to the Deacon's declaration, though I fully admit that to deny the Canonicity of the whole Book of Daniel would be a contravention of that Article." The passage about Jonah did not seem to him to assert that Jonah was not a real personage, or that the book was without authority.

ART. 10 quoted the views of Baron Bunsen, as given by Dr. Williams, on the words of John iii. 13, the Apocalypse, Hebrews, and 2 Peter, and charged Dr. Williams with denying these to be portions of Holy Scripture.

The effect of the Judgment on this charge was that a fanciful interpretation of a passage or book, or the belief that a book is post-apostolical, or that it was not written by the person whose name it bears, is not to deny the Canonicity of the portions of Scripture thus dealt with.

ART. 11 charged Dr. Williams with maintaining that the Statements of the Bible may be understood in a wholly figurative and non-natural sense, contrary to their appointed use in the lessons of the Church, and to the Answer at the Deacon's Ordination. The words thus charged were at pp. 56, 59 and 61, in which various passages of Scripture are instanced as explained by Baron Bunsen in an ideal or figurative sense. These passages include the descriptions of the Deluge, the destruction of the first-born in Egypt, the crossing of the Red Sea, and the sacrifice of Isaac.

Dr. Lushington: "All these passages are *ejusdem generis*. The only question is, do they amount to a rejection of the portions of Scripture, or are they merely interpretations of Scripture? A general averment that the statements of Scripture as to historical facts may be understood in a figurative sense, cannot be deemed a violation of belief in the truth of Scripture. No erroneous construction is a contradiction of the Deacon's declaration of belief."

The part of ART. 12 which was allowed to remain (see Reformed Article 8), quoted a description (at p. 87) of the corruptions, as Dr. Williams deemed them, of the doctrine of the Atonement. The 2d Article of Religion and the consecration prayer, in the Communion Service, were alleged to have been contradicted.

These allegations were put aside on the ground that the defence set up by Counsel was tenable, viz. that the doctrines criticized by Dr. Williams were, if the whole passage in the Essay were considered, not those of the Church of England, but of the Roman Catholic religion.

ART. 13, like the 12th, quoted a passage (p. 86) in which the writer professed to trace the corruption of a Christian doctrine. Baptism, he said, by degrees degenerated into a magical form, and the Augustinian notion of a curse inherited by infants was developed in connexion with it. This was articled as asserting that water in Baptism was not a means by which grace was received, and that St. Augustine had falsely introduced the doctrine of original sin, and as contradicting the Catechism and the 9th Article of Religion.

Dr. Lushington: "To mistake the words of St. Augustine is not criminal. I cannot undertake an investigation of what St. Augustine wrote in some unspecified portion of his works, with a view to ascertain if in contradicting his doctrine Dr. Williams contradicts the 9th Article of Religion.

"I am not satisfied that in the passage quoted there is a denial of original sin.

"The passage generally is a historical account, not a statement of opinion, and therefore, even if shown to be erroneous, is not criminal."

ART. 14 quoted the following passage from p. 82: "Thus the Incarnation becomes with our author as purely spiritual as it was with St. Paul. The Son of David by birth is the Son of God by the Spirit of Holiness."

Dr. Lushington: "This is understood as affirming that the Incarnation was purely spiritual, and that the Son of God did not take man's nature in the Womb of the Blessed Virgin: a doctrine inconsistent with the Second Article of Religion."

"Dr. Williams states: That Bunsen's doctrine agrees with that of St. Paul in Rom. i. 1—4. Does Dr. Williams here give a false view of St. Paul's words, and then accept that view as his own? On the contrary, the sentence seems to be not an unfair expression of the substance of what St. Paul wrote; and the omission of the special mark of Christ's being the Son of God, viz. the Resurrection, does not affect the meaning."

ART. 17 charged the general tendency of the Essay, which was said to be to inculcate a disbelief in Inspiration, to reduce the Scriptures to a level with the writings of Luther and Milton, to

deny the predictions of the Old Testament, to discredit the truth and genuineness of the historical parts of the Old Testament and of portions of the New; and to deny or misrepresent the Doctrines of Original Sin, Infant Baptism, Justification by Faith, the Atonement, and the Incarnation.

This was rejected, on the ground that the Article contained no specification of the charges, such as was required by the Judgment of the Privy Council in *Heath* v. *Burder*.

(ii.) MR. WILSON'S CASE.

ART. 7 cited certain passages from pp. 160, 163, 195, 204-5 of the "Essays and Reviews," in which Mr. Wilson, in dwelling upon the supremacy of the moral aspects of Christianity, was charged with contradicting expressions which speak of Christ as the Redeemer and the source of forgiveness, which are found in the Nicene and Athanasian Creeds, in the Communion Service, and the Collect for Easter Eve.

The Judgment may be stated thus:—

The first two passages are ambiguous, and in some parts self-contradictory. But to say that Christ is a moral teacher is not to say that he is nothing more; to say that the source of religion is in the heart is not to say that it has no other source; nor does the ethical development of the members of the Church exclude the primary Christian doctrines. In a criminal case we cannot construe these statements into denials such as the charge infers.

In the third passage there is no repugnancy to the Articles or Formularies.

The rejected part of ART. 8 cited a passage at pp. 176-7, in which the writer advocates liberty to interpret allegorically, or otherwise, various statements, which he instances, both in the Old and New Testament, and to criticize the dates, authorship, and relative importance of the Canonical books; and in which he says that those who are able ought "to distinguish between the different kind of words which Scripture contains, between the dark patches of human passion and error, which form the partial crust upon it, and the bright centre of spiritual truth within." These are alleged to be contrary to the 6th, 7th, and 20th Articles, the Homily On Taking Offence at certain Passages of Scripture, the Nicene Creed, and the words in the Ordination of Priests, "Take thou authority to preach the Word of God."

This was rejected on the ground that "the Articles of Religion and Formularies do not prescribe any general mode of construction

or interpretation, provided the Canonicity be not impeached, and provided the clergyman does not apply his mode of interpretation, so as to reject any of the particular dogmas enforced in the Articles."

ART. 9 cited the passage condemned under Art. 8, and also a long passage, pp. 199—203. The latter relates to what Mr. Wilson calls Ideology. These passages were taken as affirming that a clergyman is at liberty to teach a metaphorical or ideal interpretation of any biblical narrative, and to deny its reality; and this view was taken as contravening the 6th and 7th Articles of Religion, the three creeds, and the teaching of the Church in selecting for lessons portions of Scripture thus dealt with by Mr. Wilson.

The Judgment was :—

"I must repeat *usque ad nauseam*, that I have no concern with interpretation unless it involves doctrine trenching upon the Articles. To maintain a figurative sense of parts of Scripture is not to deny their canonicity. Mr. Wilson says that 'the literalist and idealist are fed by the same truths,' and that each equally maintains the inspiration of Scripture.

"I see to what fearful consequences this doctrine may be carried; but, provided that the doctrines of the Articles and Formularies are not contravened, the law lays down no limits of construction, no rule of interpretation for the Scriptures. My authority cannot reach this case."

ART. 10 related to Mr. Wilson's theory of subscription to the Thirty-nine Articles, propounded in pp. 180—4. His words were charged as implying that they may be subscribed in a sense contrary to that in which they are imposed by the 36th Canon.

The Judgment was :—

"If Mr. Wilson maintains that some of the Articles are such as a man may not with a good conscience subscribe (and some of his expressions come very near to this), he is amenable to the 5th Canon. But this is not the charge.

"It is clear, however, that Mr. Wilson does hold that a clergyman may subscribe to the Articles without any regard to the plain literal meaning of them. But it is a very different thing to violate a law and to advise others to evade it. Mr. Wilson has done the latter, not the former, and there is no breach of the 36th Canon itself."

ART. 11 quoted from pp. 185-6, Mr. Wilson's opinions upon the Articles of Religion as imposed by Statute. The passages cited were taken to assert that a clergyman may himself disbelieve, and

in his teaching pass by the doctrines of the first five Articles of Religion, and thus to be contrary to the 36th Canon.

The Judgment was:—

"I do not think Mr. Wilson's contention consistent with the declaration made under Canon 36. But the offence struck at by the Canon is the omission to subscribe, and this Mr. Wilson has not committed."

The rejected part of ART. 12 quoted a passage at pp. 153-4, relating to the possibility of those who have never heard of Christ being saved without faith in Him. These words were alleged to contradict the 9th and 18th Articles of Religion.

The Judgment was:—

"I am unable to discover in these words any conflict with the Articles cited. Mr. Wilson does not say that men will be saved by the law they profess. He neither avers nor denies that they will be saved by the name of Jesus Christ. He merely says they will be equitably dealt with.

"I do not find that the Articles declare that the penalty will be exacted when the means of attaining saving faith have not existed."

ART. 13 quoted, from p. 161, a passage which speaks of "the 1st, or genuine Epistle of Peter." This was charged as affirming, by necessary implication, that the 2d Epistle was not written by St. Peter, such affirmation being contrary to the 6th Article of Religion.

Dr. Lushington: "I think the inference just that Mr. Wilson means to deny the genuineness of the 2d Epistle.

"I cannot on this ground hold that the 6th Article has been infringed. The Epistle might be a Canonical Book, though not written by St. Peter. It might have been written by another under Divine guidance—the essential condition of canonicity."

III.—THE ADMITTED ARTICLES AND JUDGMENT OF THE DEAN OF ARCHES.

THE first six Articles in Dr. Williams' case are purely formal. They state that Dr. Williams is amenable to the laws, statutes, constitutions, and Canons Ecclesiastical; that he was admitted in 1859 to the Vicarage of Broad Chalk, that he was the author of the "Essay on Bunsen's Biblical Researches," published in the "Essays and Reviews," the advertisement to which is given at length; and that the book has passed through nine editions without alteration.

Of the Articles charging false doctrine, nine out of ten were, as

has been stated above, either wholly or partially rejected, and in the Reformed Articles, they were reduced to three, which form therefore the seventh, eighth, and ninth of the Reformed Articles.

The tenth (originally sixteenth) asserts the general agreement of the author with the opinions of Baron Bunsen as set forth in his review; the eleventh (originally eighteenth) annexes the whole book of the "Essays and Reviews," and the four remaining Articles allege the admission of the authorship of the Essay by Dr. Williams, its publication by his direction, the scandal which it has caused, the promotion of the office of judge by the Bishop of Salisbury, and the notoriety of the facts thus stated.

Similarly in the case of Mr. Wilson, the first six and last five Articles allege his admission to the Vicarage of Great Staughton, in the County of Huntingdon, and other facts precisely similar to those recounted in the case of Dr. Williams. The Articles charging false doctrine which remain, are the seventh, eighth, and ninth (originally eighth, twelfth, and fourteenth).[1]

DR. WILLIAMS' CASE.

Article VII.

"That in the said Article, Essay, or Review, are contained the following passages, that is to say, at pages 60 and 61 :—

"'As in his *Egypt* our author sifts the historical date of the Bible, so in his *Gott in der Geschichte* he expounds its directly religious element. Lamenting, like Pascal, the wretchedness of our feverish being when estranged from its eternal stay, he traces, as a countryman of Hegel, the Divine thought bringing order out of confusion. Unlike the despairing school, who forbid us trust in God, or in conscience, unless we kill our souls with literalism, he finds salvation for men and states only in becoming acquainted with the Author of our life, by whose reason the world stands fast, whose stamp we bear in our forethought, and whose voice our conscience echoes. In the Bible, as an expression of devout reason, and therefore to be read with reason in freedom, he finds record of the spiritual giants whose experience generated the religious atmosphere we breathe.'

[1] The Articles, imputing false doctrine, are given at length in the text. The words of the Judgment in the Court of Arches condemning the doctrine to which they relate, are added after each Article. These Articles are taken from the volumes of Pleadings before the Privy Council. The form of them is different in the two cases, a certified statement of the charges and extracts having been brought up in the case of Dr. Williams, while, in the case of Mr. Wilson, the Articles retain their original form as addressed to him by the Judge.

"At pages 77 and 78 :—

" 'But if such a notion alarms those who think that, apart from omniscience belonging to the Jews, the proper conclusion of reason is atheism; it is not inconsistent with the idea that Almighty God has been pleased to educate men and nations, employing imagination no less than conscience, and suffering His lessons to play freely within the limits of humanity and its shortcomings: nor will any fair reader rise from the prophetical disquisitions, without feeling that he has been under the guidance of a Master's hand. The great result is to vindicate the work of the Eternal Spirit; that abiding influence, which, as our Church teaches us in the Ordination Service, underlies all others, and in which converge all images of old time, and means of grace now; Temple, Scripture, Finger, and Hand of God; and again, preaching, sacraments, waters which comfort, and flame which burns. If such a Spirit did not dwell in the Church the Bible would not be inspired, for the Bible is, before all things, the written voice of the congregation. Bold as such a theory of inspiration may sound, it was the earliest creed of the Church, and it is the only one to which the facts of Scripture answer. The Sacred writers acknowledge themselves men of like passions with ourselves, and we are promised illumination from the Spirit which dwelt in them. Hence, when we find our Prayer-Book constructed on the idea of the Church being an inspired society, instead of objecting that every one of us is fallible, we should define inspiration consistently with the facts of Scripture, and of human nature. These would neither exclude the idea of fallibility among Israelites of old, nor teach us to quench the Spirit in true hearts for ever. But if any one prefers thinking the Sacred writers passionless machines, and calling Luther and Milton "uninspired," let him co-operate in researches by which his theory, if true, will be triumphantly confirmed.' "

It is then charged :—

"That in the passages hereinbefore recited, being portions of the said Article, Essay, or Review, the said Reverend Rowland Williams did advisedly maintain and affirm, that the Bible or Holy Scripture is an expression of devout reason, and the written voice of the congregation, not the Word of God, nor containing any special revelation of His truth, or of His dealings with mankind, nor the rule of our faith; or that he did therein advisedly maintain and affirm doctrines, positions, or opinions, to that or the like purport and effect, and that the said doctrines, positions, or

opinions are contrary to or inconsistent with the sixth, seventh, and twentieth of the said Articles of Religion, and contrary to and inconsistent with that part of the Nicene Creed, which declares in substance that the Holy Ghost spake by the prophets."

The Judgment of the Court of Arches on this was as follows:—

"First, then, to ascertain the real meaning of the passages extracted; and I must say this is no easy task.. If the author had studied to express his sentiments with ambiguity, I doubt if he could have been more successful. Having read and re-read the passage cited at pages 60 and 61, I am not satisfied that I distinctly and accurately comprehend its import; perhaps my imperfect knowledge of these questions may be the cause; but I really know nothing of 'a despairing school which forbids us to trust in God or in conscience, unless we kill our souls with literalism.' Upon that sentence, therefore, I have nothing to say, nor upon the sentence following.

The passage then proceeds:

"In the Bible, as an expression of devout reason, and therefore to be read with reason in freedom, he finds a Record of the spiritual Giants, whose experience generated the religious atmosphere we breathe.'

These are words which Dr. Williams puts into the mouth of Baron Bunsen. Dr. Williams does not reprobate the opinions so expressed. I think, looking at the whole of the Essay, he approves and adopts them. This passage, if I correctly understand it, asserts an affirmative proposition, that the Bible is an expression of devout reason. Now is such a proposition in conflict with the Articles of Religion cited, namely, the Sixth, Seventh, and Twentieth? for I disclaim referring to the passages of Scripture also pleaded.

"The Sixth Article declares that 'Holy Scripture containeth all things necessary for salvation.' I have held that the words necessarily imply the proposition, that the Scriptures, so far as the salvation of man is concerned, have been written by the interposition of the Almighty power of God. With every desire to put upon Dr. Williams's words a construction reconcilable with the Article, I must hold that to characterize without qualification the Bible as an expression of devout reason, is inconsistent with the doctrine that it was written by the interposition of God; which doctrine, I have said, is an indispensable part of the Sixth Article. It appears to me, that if the Bible in matters essential to salvation

be declared to have emanated from Divine power, all suppositions inconsistent with that declaration are necessarily excluded. If it be God's Word written, as said in the Twentieth Article, it is not the expression of devout reason. Devout reason belongs to the acts and doings of man, and not to the works of the Almighty."

"I come to the quotation from pages 77 and 78 of the Review. After some observations, which I need not repeat at large, it is said, 'The great result is, to vindicate the work of the Eternal Spirit;' then afterwards, 'If such a Spirit did not dwell in the Church, the Bible would not be inspired: for the Bible is, before all things, the written word of the congregation.' It is very difficult, for me at least, to ascertain the true intent of this sentence. It is not a denial that the Bible is inspired, but it alleges that it is the written voice of the congregation. The extract goes on: 'Bold as such a theory of Inspiration may sound, it was the earliest creed of the Church, and it is the only one to which the facts of Scripture answer.' It is not in my province to say whether this was the earliest creed of the Church. I have to look to the doctrine of the Church of England only; and, so far as my knowledge extends, there is not to be found in the Articles or in the Formularies a single syllable consistent with the assertion that the Bible is the written voice of the congregation. The doctrine of the Church of England is expressed in the Twentieth Article, that the Bible is the written Word of God.

"Whether the sacred writers ought to be called 'passionless machines,'—that is, if I rightly apprehend the meaning, whether they wrote down what the Divine power dictated, without thought or understanding,—is a question I do not enter upon. But I must make one observation referring to what I have before said. I hold the comparison with Luther and Milton to be erroneous; erroneous because the doctrine of the Church in the Articles of Religion cited is, that the sacred writers wrote from the influence of a supernatural power to effect a given object, clearly distinct from the ordinary operation of God's omnipotence on the minds of men in its ordinary course.

"I am of opinion that the second and fourth passages above quoted, according to the only construction I can put upon them, are not to be reconciled with the Articles of Religion cited. I hold that the Sixth and Seventh Articles of Religion impose the obligation of acknowledging that the Bible, in matters essential to salvation, is the written Word of God; that it was written by the

interposition of the Almighty, supernaturally brought to operate. I hold that, to declare the Bible to be an expression of devout reason,—to be the written voice of the congregation,—is a violation of the Sixth and Seventh Articles of Religion. I think such positions are substantially inconsistent with the all-important doctrine imposed by law, that the Bible is God's Word written."

ARTICLE VIII. (ORIGINALLY XII.) :—

"That in the said Article, Essay, or Review, is contained the following passages, at pages 81 and 87 :—

"'Propitiation would be the recovery of that Peace, which cannot be, while Sin divides us from the Searcher of Hearts.'

That in the passage hereinbefore recited, being a portion of the said Article, Essay, or Review, the said Reverend Rowland Williams did advisedly maintain and affirm, that the Offering of Christ is not the propitiation for the sins of the whole world; or that he did therein advisedly maintain and affirm a doctrine, position, or opinion, to that or the like purport and effect; and that such doctrine, position, or opinion, is contrary or inconsistent with the thirty-first of the said Articles of Religion."

The Judgment upon this was as follows :—

"As to the passage cited, p. 81—'Propitiation would be the recovery of that Peace which cannot be, while Sin divides us from the Searcher of hearts,'—I have to determine whether the construction put upon it by the Promoter of this proceeding is the right one, that is, whether it is substantially an assertion that Christ did not 'suffer, or was crucified, dead, and buried, to reconcile His Father to us, or to be a sacrifice for the original guilt as well as for the actual sins of men; that "the offering of Christ" is not "the perfect redemption, propitiation, and satisfaction for the sins of the world."' I think Dr. Williams is here expressing what in substance are his own views; and the first inquiry must be, in what sense he has used the word 'Propitiation;' and for that purpose I must consider the import of the two preceding sentences :—

"'If our Philosopher had persuaded us of the moral nature of Justification, he would not shrink from adding that Regeneration is a corresponding giving of insight, or an awakening of the forces of the soul. By the Resurrection he would mean a spiritual quickening. Salvation would be our deliverance, not from the

Life-giving God, but from evil and darkness, which are his finite opposites (ὁ ἀντικείμενος). Propitiation would be &c.'

"It is apparent that Dr. Williams is here speaking of Justification, Regeneration, and Salvation, as doctrines to which he and Baron Bunsen might give a peculiar construction—in other words, the leading doctrines of the Church are adverted to, and a meaning ascribed to them very different from that usually received. In a similar way is the word 'Propitiation' used. Propitiation is by the Thirty-first Article of Religion the oblation by Christ finished upon the Cross for sin. Dr. Williams declares it to be 'the recovery of that Peace which cannot be, whilst Sin divides us from the Searcher of hearts.' Such may be a consequence from Propitiation or the oblation of Christ, but it is not Propitiation itself. I think such declaration is inconsistent with and contrary to the Thirty-first Article."

ARTICLE IX. (ORIGINALLY XV.) :—

"That in the said Article, Essay, or Review, is contained the following passage, at pages 80, 81, in the words following, to wit :—

"'For though he embraces, with more than orthodox warmth, New Testament terms, he explains them in such a way, that he may be charged with using evangelical language in a philosophical sense; but in reply, he would ask, what proof is there that the reasonable sense of St. Paul's words was not the one which the apostle intended? Why may not justification by faith have meant the peace of mind, or sense of Divine approval, which comes of trust in a Righteous God, rather than a fiction of merit by transfer? St. Paul would then be teaching moral responsibility, as opposed to sacerdotalism, or, that to obey is better than sacrifice. Faith would be opposed, not to the good deeds which conscience requires, but to works of appeasement by ritual. Justification, would be neither an arbitrary ground of confidence nor a reward upon condition of our disclaiming merit, but rather a verdict of forgiveness upon our repentance, and of acceptance upon the offering of our hearts.'

"That in the passage hereinbefore recited, being portion of the said Article, Essay, or Review, the said Reverend Rowland Williams did advisedly maintain and affirm, that justification by faith means only the peace of mind, or sense of Divine approval, which comes of trust in a righteous God, and that justification is a verdict

of forgiveness upon our repentance, and of acceptance upon the offering of our hearts; or, that he did therein advisedly maintain and affirm a doctrine, position, or opinion, to that or the like purport or effect; and that such doctrine, position, or opinion, is contrary to or inconsistent with the 11th of the said Articles of Religion."

The Judgment upon this was as follows:—

"The charge is, that Dr. Williams in the extract pleaded did maintain that justification by faith means only the peace of mind or sense of Divine approval which comes of trust in a righteous God; and that 'justification is a verdict of forgiveness upon our repentance, and of acceptance upon the offering of our hearts.' It is said that the doctrine so alleged to be set forth is contrary to the Eleventh Article of Religion,—on the Justification of Man: 'We are accounted righteous before God only for the merit of our Lord and Saviour Jesus Christ by faith, and not for our own works or deservings.' I entirely concur that such opinion set forth in the charging part of this Article is contrary to, and inconsistent with, the Eleventh Article; but then the question remains, is the charge preferred a fair representation of the passage extracted? The passage is as follows:—

"'Why may not justification by faith have meant the peace of mind, or sense of Divine approval, which comes of trust in a righteous God, rather than a fiction of merit by transfer? St. Paul would then be teaching moral responsibility, as opposed to Sacerdotalism.'

"The words are suggested by Dr. Williams as words which Baron Bunsen might speak in reply to a charge of using evangelical language in a philosophical sense. But looking to the whole context, I cannot doubt that Dr. Williams employs these words as a form of declaring his own sentiments. He is therefore responsible for them.

"Then as to the construction of the passage. I think the passage is repugnant to the Eleventh Article; for in it justification is not represented to be justification for the merit of our Lord by faith, but is represented to be something distinct from it, namely, peace of mind, or a sense of Divine approval, which comes of trust in a righteous God. I think this construction is clear from the words which follow, 'rather than from a fiction of merit by transfer.' These words seem to me to express an idea wholly inconsistent with the Eleventh Article."

MR. WILSON'S CASE.

ARTICLE VII. (ORIGINALLY VIII.):—

"And we further article and object to you, the said Rev. Henry Bristow Wilson, that in the said Article, Essay, or Review, is the following passage at pages 175-6-7 :—

"'It has been matter of great boast within the Church of England, in common with other Protestant Churches, that it is founded upon the "Word of God;" a phrase which begs many a question, when applied collectively to the books of the Old and New Testaments, a phrase which is never so applied to them by any of the Scriptural authors, and which, according to Protestant principles, never could be applied to them by any sufficient authority from without. In that which may be considered the pivot Article of the Church, this expression does not occur, but only "Holy Scripture," "Canonical Books," "Old and New Testaments." It contains no declaration of the Bible being throughout supernaturally suggested, nor any intimation as to which portions of it were owing to a special divine illumination, nor the slightest attempt at defining inspiration, whether mediate or immediate, whether through or beside, or overruling the natural faculties of the subject of it—not the least hint of the relation between the divine and human elements in the composition of the Biblical books. Even if the Fathers have usually considered "canonical" as synonymous with "miraculously inspired," there is nothing to show that their sense of the word must necessarily be applied in our own Sixth Article. The word itself may mean either books ruled and determined by the Church or regulative books, and the employment of it in the Article hesitates between these two significations. For at one time "Holy Scripture" and canonical books are those books "of whose authority never was any doubt in the Church;" that is, they are "determined" books; and then the other, or uncanonical books, are described as those which "the Church doth not apply to establish any doctrine," that is, they are not "regulative" books. And if the other principal Churches of the Reformation have gone farther in definition, in this respect, than our own, that is no reason we should force the silence of our Church into unison with their expressed declarations, but rather that we should rejoice in our comparative freedom. The Protestant feeling among us has satisfied itself in a blind way with the anti-Roman declaration that "Holy Scripture containeth all things necessary to salvation, so that whatsoever is not read therein,

nor may be proved thereby, is not to be required of any man, that it should be believed as an article of the faith," &c., and without reflecting how very much is wisely left open in that Article. For this declaration itself is partly negative and partly positive; as to its negative part, it declares that nothing—no clause of creed, no decision of council, no tradition or exposition—is to be required to be believed on peril of salvation, unless it be Scriptural; but it does not lay down that everything which is contained in Scripture must be believed on the same peril. Or it may be expressed thus:—the Word of God is contained in Scripture, whence it does not follow that it is co-extensive with it. The Church to which we belong does not put that stumbling-block before the feet of her members; it is their own fault if they place it there for themselves, authors of their own offence.'"

"And we article and object to you, the said Reverend Henry Bristow Wilson, that in the passage hereinbefore recited, being portion of the said Article, Essay, or Review, you did advisedly declare and affirm in effect, that the Scriptures of the Old and New Testament were not written under the Inspiration of the Holy Spirit, and that they were not necessarily at all, and certainly not in parts, the word of God, or that you did therein advisedly declare and affirm a doctrine, position, or opinion to that or the like purport and effect. And that such doctrine, position, or opinion is contrary to, or inconsistent with, the Sixth, and Twentieth of the said Articles of Religion, and contrary to, or inconsistent with, the teaching of the said Church, as contained in that part of the Nicene Creed, which declares, in substance, that the Holy Ghost spake by the prophets; and as set forth in the ordering of Priests in the said Book of Common Prayer, to wit, in the words following:—'The Bishop shall deliver to every one of them the Bible into his hands, saying, Take thou authority to preach the word of God.' And we article and object as before."

The Judgment was as follows:—

"The charge preferred is, that the Scriptures of the Old and New Testament were not written under the inspiration of the Holy Spirit, and that they were not necessarily at all, and certainly not in parts, the Word of God; and that such doctrines are contrary to the Sixth, Seventh, and Twentieth Articles of Religion, and also to the Homilies cited. Before I come to consider the passages which are said to avow these doctrines, I must bear in mind what I deem to be the true meaning of the Articles of Religion cited.

Now, referring to what I have already said in the previous case of the Bishop of Salisbury *v.* Dr. Williams, I must declare my opinion to be, that the true construction of those Articles is, that the Scriptures, so far as relates to matters concerning salvation, were written by the Divine interposition of God, and that in a manner different from the ordinary agency of Providence; but I cannot go the length of saying that all parts of what are termed the Holy Scriptures were, without exception, so written. I now turn to what Mr. Wilson has written. It is not easy to condense in a few words the whole import of this long extract. The first part of it avers that—

"'It has been matter of great boast within the Church of England, in common with other Protestant Churches, that it is founded upon the "Word of God;" a phrase which begs many a question when applied collectively to the books of the Old and New Testaments: a phrase which is never so applied to them by any of the Scriptural authors, and which, according to Protestant principles, never could be applied to them by any sufficient authority from without.'

Whether the statement contained in the first sentence of the above passage is historically true or not, it belongs not to me to inquire; and as to the last sentence I have just read, whatever may be its meaning, it is much too vague to enable me to draw any conclusion from it.

"Then follows a comment upon the Sixth Article of Religion. It is true, as Mr. Wilson says, the Article does not contain the expression 'Word of God.' It is true that it does not contain a declaration of the Bible having been *throughout* supernaturally suggested, nor any intimation as to which portions of it were owing to a special Divine illumination. Mr. Wilson then contends that if the Fathers have usually considered 'canonical' as synonymous with 'miraculously inspired,' there is nothing to show that this sense of the word must necessarily be applied to the Sixth Article.

"I cannot concur with this exposition of the meaning of the Sixth Article. I think, as I have said before, that the averment that the Bible contains all things necessary for salvation, to that extent necessarily implies that it was written by the special interposition of the Almighty for that purpose. I think this construction strongly supported by the Twentieth Article of Religion; the Bible is there called 'God's Word written.' I feel myself compelled

to come to the conclusion that, in the passage quoted, Mr. Wilson, expressing the opinion which he himself holds, denies that the Bible was written by the special interposition of the Almighty power; and that such doctrine cannot be reconciled with the Sixth and Twentieth Articles."

ARTICLE VIII. (ORIGINALLY XII.) :—

"Also, we further article and object to you, the said Reverend Henry Bristow Wilson, that in the said Article, Essay, or Review, are the following passages, at pages 153, 154 :—

"'And when we hear fine distinctions drawn between covenanted and uncovenanted mercies, it seems either to be a distinction without a difference, or to amount to a denial of the broad and equal justice of the Supreme Being. We cannot be content to wrap this question up and leave it for a mystery as to what shall become of those myriads upon myriads of non-Christian races.'

"And we article and object to you, the said Reverend Henry Bristow Wilson, that in the passages hereinbefore recited, being a portion of the said Article, Essay, or Review, you did advisedly declare and affirm that the condition of men in a future state of existence will be determined by their moral conduct, according to the Law or Sect which they severally profess, exclusive of their religious belief; or that you did therein advisedly declare and affirm a doctrine, position, or opinion to that or the like purport or effect; and that such doctrine, position, or opinion is contradictory to, or inconsistent with, the Eighteenth of the said Articles of Religion. And we Article and object as before."

The Judgment was as follows :—

"This Article charges that the opinions maintained in the extracts are contradictory of, or inconsistent with, the Ninth and Eighteenth Articles of Religion.

"The Ninth Article of Religion is on Original Sin, which it thus defines :

"'Original sin is the fault and corruption of the nature of every man that naturally is engendered of the offspring of Adam. It (that is, the corruption) deserveth God's wrath and damnation.'

It would be repugnant to this Article to deny the universal existence of original sin, or to deny that it deserves God's wrath and damnation.

"The Eighteenth Article is in these words :

"'They also are to be had accursed that presume to say, That

every man shall be saved by the law or sect which he professeth, so that he be diligent to frame his life according to that law, and the light of Nature. For Holy Scripture doth set out unto us only the name of Jesus Christ, whereby men must be saved.'

"What is the negative of this Article: what is repugnant to it? I would fain here, if it were permitted to me, shelter myself under the explanation which I know to have been given by some of the authorities of the Church; but this course is not open to me: I must put a judicial construction upon the plain literal meaning. I have, however, a right, and indeed am bound to look at the surrounding circumstances to assist me in ascertaining the meaning. The latter part of this Article of Religion appears to me to admit of no doubt. It would clearly be an impugning of the Article to deny that 'Holy Scripture sets out that it is by the name of Jesus Christ alone that man must be saved.' I am, however, of opinion that this Eighteenth Article was addressed to Christian men and no other, and that it was intended to censure Christians for *declaring* the doctrine that man could be saved 'by the law he professed, and the light of Nature.' I say *declaring* the doctrine, by which I mean emphatically *promulgating* the doctrine. The reason is obvious. It was the acknowledged duty of all Christian men to spread the faith in Christ throughout the world, for by that faith salvation was assured. It was wholly inconsistent with the performance of that duty to proclaim that the name of Christ was unnecessary to salvation, and that every man could be saved by the law or sect which he professed, or by the light of Nature.

"Has Mr. Wilson, then, violated these two Articles? That is the issue I have to try; not whether, on other grounds, the passages cited may be open to censure.

"I will take the passage:

"'As for necessity of faith in a Saviour to those people who could never have heard it, no one, upon reflection, can believe any such thing: doubtless they will be equitably dealt with.'

"I am unable to discover in these words any conflict with the Articles of Religion cited. I am bound to adopt a charitable construction. Mr. Wilson does not here say that the persons here spoken of would be saved by the law they profess; he neither avers nor denies that they will be saved by the name of Jesus Christ; but only says that 'they will be equitably dealt with.' This is no negative of the Eighteenth Article. To the salvation promised by our Saviour faith is indispensable; but the Article, as I understand

it, is wholly silent as to the necessity of faith to persons who never could have had it.

"The next passage is of a more doubtful description:

"'And when we hear fine distinctions drawn between covenanted and uncovenanted mercies, it seems either to be a distinction without a difference, or to amount to a denial of the broad and equal justice of the Supreme Being.'

"I think the meaning of this passage is a denial of any distinction between covenanted and uncovenanted mercies. Now covenanted mercy is the mercy promised by our Saviour to those who believe in Him; uncovenanted mercy is that which God may be pleased to bestow, though no promise thereof has been made. Covenanted mercy is matter of absolute certainty, the fulfilment of the promise of the Almighty; uncovenanted mercy is speculation of what may happen upon a human idea of the Divine attributes. The two things appear to me clearly and essentially distinct. To deny any distinction appears to me to declare that a man may be saved by the law which he professeth. Whether this proposition be true or not, is not the question. I think the Eighteenth Article prohibits its being declared; and therefore I must come to the conclusion that the Article has been infringed."

ARTICLE IX. (ORIGINALLY XIV):—

And we further article and object to you, the said Reverend Henry Bristow Wilson, that in the said Article, Essay, or Review, is contained the following passage at page 206:—

'The Christian Church can only tend on those who are committed to its care, to the verge of that abyss which parts this world from the world unseen. Some few of those fostered by her are now ripe for entering on a higher career; the many are but rudimentary spirits—germinal souls. What shall become of them? If we look abroad in the world, and regard the neutral character of the multitude, we are at a loss to apply to them either the promises or the denunciations of revelation. So, the wise heathens could anticipate a reunion with the great and good of all ages; they could represent to themselves, at least in a figurative manner, the punishment and the purgatory of the wicked; but they would not expect the reappearance in another world, for any purpose, of a Thersites or an Hyperbolos—social and poetical justice had been sufficiently done upon them. Yet there are such as these, and no better than these, under the Christian name — babblers, busy-

bodies, livers to get gain, and mere eaters and drinkers. The Roman Church has imagined a *limbus infantium;* we must rather entertain a hope that there shall be found, after the great adjudication, receptacles suitable for those who shall be infants, not as to years of terrestrial life, but as to spiritual development —nurseries as it were and seed grounds, where the undeveloped may grow up under new conditions—the stunted may become strong, and the perverted be restored. And when the Christian Church in all its branches shall have fulfilled its sublunary office, and its Founder shall have surrendered His Kingdom to the Great Father—all, both small and great, shall find a refuge in the bosom of the Universal Parent, to repose, or be quickened into higher life, in the ages to come, according to his Will.'

"And we article and object to you, the said Reverend Henry Bristow Wilson, that in the passage hereinbefore recited, being a portion of the said Article, Essay, or Review, you did advisedly declare and affirm in effect, that after this life and at the end of the existing order of things on this Earth, there will be no judgment of God, awarding to those Men whom he shall then approve, everlasting life or eternal happiness, and to those Men whom he shall then condemn, everlasting death or eternal misery; or that you did therein advisedly declare and affirm, a doctrine, position, or opinion, to that or the like purport and effect; and that the said doctrine, position, or opinion is contrary to or inconsistent with the teaching of the said Church, as contained in the Creeds, commonly called the Apostles' Creed, the Nicene Creed, and St. Athanasius' Creed; And as contained in the Absolution or Remission of Sins, which forms part of the Morning Prayer, in the said Book of Common Prayer, and in which the Priest says, 'Wherefore let us beseech Him to grant us true repentance and His Holy Spirit, that those things may please Him which we do at this present; and that the rest of our life hereafter may be pure and holy, so that at the last, we may come to his eternal joy; through Jesus Christ our Lord.' And as contained in the following part of the Catechism which forms part of the said Book of Common Prayer. 'Question. What desirest thou of God in this Prayer? Answer. I desire my Lord God our Heavenly Father, who is the Giver of all Goodness, to send his Grace unto me and to all people. And I pray unto God that he will keep us from all Sin and Wickedness, and from our Ghostly Enemy, and from Everlasting Death.' And as contained in the following portions of the

Order for the Burial of the Dead, which forms part of the said Book of Common Prayer. 'In sure and certain hope of the Resurrection to Eternal Life, through our Lord Jesus Christ, who shall change our vile body, that it may be like unto His Glorious body according to the mighty working, whereby He is able to subdue all things unto Himself.' 'O Merciful God, the Father of our Lord Jesus Christ, who is the Resurrection and the Life; in whom whosoever believeth shall live though he die; and whosoever liveth and believeth in Him shall not die eternally; who also hath taught us by His Holy Apostle, Saint Paul, not to be sorry as men without hope, for them that sleep in Him; we meekly beseech Thee, O Father, to raise us from the death of Sin unto the life of Righteousness; that when we shall depart this life, we may rest in Him, as our hope is this our Brother doth; and at the general resurrection in the last day, we may be found acceptable in Thy sight, and receive that blessing, which Thy well-beloved Son shall then pronounce to all that love and fear Thee, saying, Come, ye blessed children of my Father, receive the Kingdom prepared for you from the beginning of the World.' And as contained in the following portions of the Commination Service, which forms part of the said Book of Common Prayer. 'The day of the Lord cometh as a thief in the night'—'Then shall it be too late to knock when the door shall be shut; and too late to cry for mercy when it is the time of justice. O terrible voice of most just judgment, which shall be pronounced upon them, when it shall be said unto them, "Go, ye cursed, into the fire everlasting, which is prepared for the Devil and his Angels." This if we do, Christ will deliver us from the Curse of the law, and from the extreme malediction, which shall light upon them that shall be set upon the left hand, and He will set us on His right hand, and give us the Gracious benediction of His Father, commanding us to take possession of His Glorious Kingdom.' And we article and object as before."

The Judgment was as follows:—

"In this Article I am called upon to put a construction upon the three Creeds, upon the Absolution in the Book of Common Prayer, upon the Catechism, upon the Order for the Burial of the Dead, upon the Commination Service. Even the most learned divines of our Church would not, I believe, undertake the performance of such a duty without feeling its difficulty and weight; more especially as in this case it involves questions of the most

momentous character—the future destiny of mankind. To a certain extent, I cannot escape the task, and I will not evade it.

"This being a question whether an offence has been committed against the Formularies, I must bear in mind the Judgment in the Gorham case. Their Lordships say, 'If the Articles of Religion are silent upon a point of doctrine, then, unless the Rubrics and Formularies clearly and distinctly determine it, it is open for each member of the Church to decide for himself according to his own conscientious opinion.' My duty, then, is to consider whether the citations from the Book of Common Prayer do clearly and distinctly determine the doctrine the subject of this Article. I think it would be an unprofitable task to go *seriatim* through every passage cited from the Prayer Book. I will advert to what I deem most important to the present issue.

"The Creed of St. Athanasius contains the following words:—

"'And they that have done good shall go into life everlasting; and they that have done evil into everlasting fire.'

I am, of course, aware of the controversies which have arisen upon the meaning to be attributed to these words; but I must construe them in their plain, literal, and grammatical sense, and that is clearly to assert that eternal life shall be the portion of the good, and everlasting fire the destiny of the bad. To the same effect is the passage from the Catechism: 'that God will keep us from all sin and wickedness, and from our ghostly enemy, and from everlasting death.' Similar expressions are found in the Commination.

"I now turn to what Mr. Wilson has written. The substance of the passage extracted is, that such is the neutral character of the multitude, that neither the promises nor denunciations of Revelation are applicable to them; that a hope must be entertained, that after the great adjudication, receptacles may be found for those who shall be infants as to spiritual development, where the stunted may become strong, and the perverted may be restored; and

"'When the Christian Church in all its branches shall have fulfilled its sublunary office, and its Founder shall have surrendered His kingdom to the Great Father, all, both small and great, shall find a refuge in the bosom of the Universal Parent, to repose or be quickened into higher Life in the ages to come, according to His Will.'

"I believe I put the true construction upon this passage, when I say it declares that a hope must be entertained of an intermediate state, and that finally all, both great and small, will escape

everlasting condemnation. I cannot reconcile the opinions thus declared with the passages cited of the Creeds and Formularies, and I must admit the Article."

From the sentence thus given the two accused clergymen appealed to the Queen in Council. The prayer contained in the petitions of appeal was grounded on the following reasons in each case:—

"First—Because the Appellant has not maintained and affirmed any doctrine contrary to or inconsistent with any of the Thirty-nine Articles of Religion, or contrary to or in derogation of the doctrine and teaching of the Church, as set forth in the Book of Common Prayer.

"Second—Because the passages extracted from the said Article, Essay, or Review, in the said reformed articles, do not warrant the conclusions drawn from them by the said Judge, and do not contain doctrines directly contrary and repugnant to any of the Thirty-nine Articles of Religion, or contrary to or in derogation of the doctrines and teaching of the Church, as set forth in the Book of Common Prayer."

To these reasons, in the case of Dr. Williams, the two following were added:—

"Third—Because the said Judge has ignored the in-dwelling of the Holy Spirit in the Church of God, and has otherwise misapprehended the doctrines of the Church of England, as established by law.

"Fourth—Because the said Judge has neither adequately protected the doctrine of the Church of England on Holy Baptism, nor assigned to the Appellant due redress and reparation for charges proved false or erroneous."

The appeals were heard before the Judicial Committee on June 19th to 26th, 1862. The Appellants appeared in person. The advocates of the Respondents were the Queen's Advocate (Sir R. Phillimore), Mr. Coleridge, Q.C., and Dr. Swabey.

Mr. Wilson was first heard. His speech occupied three days, and has since been published. In the course of his argument upon the second head of charge, that relating to the distinction of "covenanted and uncovenanted mercies," it was intimated to him by the Court, that their Lordships did not

see, *primâ facie*, any contradiction to the Eighteenth Article of Religion in the passage cited from the Essay, and that he need not then further argue that charge; that, if any observations made by the other side should require it, he could refer to them in his reply. The Queen's Advocate, for the Respondent, did not offer any argument in support of the charge.

Similarly, in the case of Dr. Williams, the second of the three articles of charge, that relating to the sense put upon the word "propitiation" by the Appellant, was withdrawn.

Upon the remaining articles, Judgment was given on the 8th of February, 1864, by the Lord Chancellor, as follows:—

"These Appeals do not give to this Tribunal the power, and therefore it is no part of its duty, to pronounce any opinion on the character, effect, or tendency of the publications known by the name of 'Essays and Reviews.' Nor are we at liberty to take into consideration, for the purposes of the prosecution, the whole of the Essay of Dr. Williams or of the Essay of Mr. Wilson. A few short extracts only are before us, and our Judgment must by law be confined to the matter which is therein contained. If, therefore, the Book, or these two Essays, or either of them as a whole, be of a mischievous and baneful tendency, as weakening the foundations of Christian belief, and likely to cause many to offend, they will retain that character, and be liable to that condemnation, notwithstanding this our Judgment.

"These prosecutions are in the nature of criminal proceedings, and it is necessary that there should be precision and distinctness in the accusation.

"The Articles of Charge must distinctly state the opinions which the Clerk has advisedly maintained, and set forth the passages in which those opinions are stated; and further, the Articles must specify the doctrines of the Church which such opinions or teaching of the Clerk are alleged to contravene, and the particular Articles of Religion or portions of the Formularies which contain such doctrines.

"The accuser is, for the purpose of the charge, confined to the passages which are included and set out in the Articles as the matter of the accusation; but it is competent to the

accused party to explain from the rest of his work the sense or meaning of any passage or word that is challenged by the accuser.

"With respect to the legal tests of doctrine in the Church of England, by the application of which we are to try the soundness or unsoundness of the passages libelled, we agree with the learned Judge in the Court below that the Judgment in the Gorham case is conclusive:—

"'This Court has no jurisdiction or authority to settle matters of faith, or to determine what ought in any particular to be the doctrine of the Church of England. Its duty extends only to the consideration of that which is by law established to be the doctrine of the Church of England, upon the true and legal construction of her Articles and Formularies.'

"By the rule thus enunciated it is our duty to abide.

"Our province is, on the one hand, to ascertain the true construction of those Articles of Religion and Formularies referred to in each charge, according to the legal rules for the interpretation of statutes and written instruments; and, on the other hand, to ascertain the plain grammatical meaning of the passages which are charged as being contrary to or inconsistent with the doctrine of the Church, ascertained in the manner we have described.

"It is obvious that there may be matters of doctrine on which the Church has not given any definite rule or standard of faith or opinion—there may be matters of religious belief on which the requisition of the Church may be less than Scripture may seem to warrant—there may be very many matters of religious speculation and inquiry on which the Church may have refrained from pronouncing any opinion at all.

"On matters on which the Church has prescribed no rule, there is so far freedom of opinion that they may be discussed without penal consequences. Nor in a proceeding like the present, are we at liberty to ascribe to the Church any rule or teaching which we do not find expressly and distinctly stated, or which is not plainly involved in or to be collected from that which is written.

"With respect to the construction of the passages extracted from the Essays of the accused parties, the meaning to be ascribed to them must be that which the words bear, according to the ordinary grammatical meaning of language.

"That only is matter of accusation which is *advisedly* taught or maintained by a clergyman in opposition to the doctrine of the Church. The writer cannot in a proceeding such as the present be held responsible for more than the conclusions which are directly involved in the assertion he has made.

"With these general remarks we proceed to consider in the first place the Charges against Dr. Williams.

"All the Charges against Dr. Williams were rejected by the learned Judge in the Court below, or given up at the hearing before us, except the Charges contained in the 7th and 15th Articles.

"The 7th Article, as reformed, sets forth certain passages extracted from pages 60 and 61, and from pages 77 and 78, of the volume containing Dr. Williams's Essay, and charges that in the passages so extracted Dr. Williams has advisedly maintained and affirmed that the Bible or Holy Scripture is an expression of devout reason, and the written voice of the congregation—not the Word of God, nor containing any special revelation of His truth or of His dealings with mankind, nor the rule of our faith.

"Dr. Williams has nowhere in terms asserted that Holy Scripture is not the Word of God; and the accusation therefore must mean that by calling the Bible 'an expression of devout reason, and therefore to be read with reason in freedom,' and stating that it is 'the written voice of the congregation,' Dr. Williams must be taken to affirm that it is not the Word of God.

"Before we examine the meaning of these expressions it is right to observe what Dr. Williams has said on the subject of Holy Scripture in the second of the passages included in this Charge. Dr. Williams there refers to the teaching of the Church in her Ordination Service as to the abiding influence of 'the Eternal Spirit,' and then uses these words, 'If such a Spirit did not dwell in the Church the Bible would not be

inspired;' and again, 'The Sacred Writers acknowledge themselves men of like passions with ourselves, and we are promised illumination from the Spirit that dwelt in them.'

"Dr. Williams may not unreasonably contend that the just result of these passages would be thus given:—'The Bible was inspired by the Holy Spirit that has ever dwelt and still dwells in the Church, which dwelt also in the Sacred Writers of Holy Scripture, and which will aid and illuminate the minds of those who read Holy Scripture trusting to receive the guidance and assistance of that Spirit.'

"The words that the Bible is an expression of devout reason, and therefore to be read with reason in freedom, are treated in the charge as equivalent to these words:—'The Bible is the composition or work of devout or pious men and nothing more;' but such a meaning ought not to be ascribed to the words of a writer who, a few lines further on, has plainly affirmed that the Holy Spirit dwelt in the Sacred Writers of the Bible. This context enables us to say that the words 'an expression of devout reason, and therefore to be read with reason in freedom,' ought not to be taken in the sense ascribed to them by the accusation.

"In like manner we deem it unnecessary to put any interpretation on the words 'written voice of the congregation,' inasmuch as we are satisfied that whatever may be the meaning of the passages included in this Article, they do not, taken collectively, warrant the charge which has been made that Dr. Williams has maintained the Bible not to be the Word of God, nor the Rule of Faith.

"We pass on to the remaining charge against Dr. Williams, which is contained in the 15th Article of Charge. The words of Dr. Williams, which are included in this Charge, are part of a supposed defence of Baron Bunsen against the accusation of not being a Christian. It would be a severe thing to treat language used by an imaginary advocate as advised speaking or teaching by Dr. Williams. Against such a general charge as that of not being a Christian, topics of defence may be properly urged, although not in conformity with the doctrines of the Church of England.

"But, even if Dr. Williams be taken to approve of the

arguments which he uses for this supposed defence, it would, we think, be unjust to him to take his words as a full statement of his own belief or teaching on the subject of Justification.

"The XIth Article of Religion, which Dr. Williams is accused of contravening, states, 'We are accounted righteous before God only for the merits of our Lord and Saviour Jesus Christ, by faith, and not for our own works or deservings.' The Article is wholly silent as to the merits of Jesus Christ being transferred to us. It asserts only that we are justified for the merits of our Saviour by faith, and by faith alone. We cannot say therefore that it is penal in a Clergyman to speak of merit by transfer as a fiction, however unseemly that word may be when used in connexion with such a subject.

"It is fair, however, to Dr. Williams to observe that in the argument at the Bar he repudiated the interpretation which had been put on these words, that 'the doctrine of merit by transfer is a fiction,' and he explained fiction as intended by him to describe the phantasy in the mind of an individual that he has received or enjoyed merit by transfer.

"Upon the whole we cannot accept the interpretation charged by the Promoter as the true meaning of the passages included in this 15th Article of Charge, nor can we consider those passages as warranting the specific charge, which, in effect, is that Dr. Williams asserts that justification by faith means *only* the peace of mind or sense of Divine approval which comes of trust in a righteous God. This is not the assertion of Dr. Williams.

"We are therefore of opinion that the Judgment against Dr. Williams must be reversed.

"We proceed to consider the Charges against Mr. Wilson.

"These have been reduced to the 8th and 14th Articles of Charge. The other Articles of Charge were either rejected by the Court below, or have been abandoned at the hearing before this Tribunal.

"In the 8th Article of Charge an extract of some length is made from Mr. Wilson's Essay, and the accusation is, that in

the passage extracted Mr. Wilson has declared and affirmed *in effect* that the Scriptures of the Old and New Testament were not written under the inspiration of the Holy Spirit, and that they were not necessarily at all, and certainly not in parts, the Word of God; and then reference is made to the VIth and XXth Articles of Religion, to part of the Nicene Creed, and to a passage in the Ordination of Priests in the Book of Common Prayer.

"This Charge therefore involves the proposition, 'That it is a contradiction of the doctrine laid down in the VIth and XXth Articles of Religion, in the Nicene Creed, and in the Ordination Service of Priests, to affirm that any part of the Canonical Books of the Old or New Testament, upon any subject whatever, however unconnected with religious faith or moral duty, was not written under the inspiration of the Holy Spirit.'

"The proposition or assertion that every part of the Scriptures was written under the inspiration of the Holy Spirit is not to be found either in the Articles or in any of the Formularies of the Church. But in the VIth Article it is said that Holy Scripture containeth all things necessary to salvation, and the Books of the Old and New Testament are therein termed Canonical. In the XXth Article, the Scriptures are referred to as 'God's Word written;' in the Ordination Service, when the Bible is given by the Bishop to the Priest, it is put into his hands with these words, 'Take thou authority to preach the Word of God;' and in the Nicene Creed are the words, 'the Holy Ghost who spake by the Prophets.'

We are confined by the Article of Charge to the consideration of these materials, and the question is, whether in them the Church has affirmed that every part of every Book of Scripture was written under the inspiration of the Holy Spirit, and is the Word of God.

"Certainly, this doctrine is not involved in the statement of the VIth Article, that Holy Scripture containeth all things necessary to salvation. But inasmuch as it doth so from the revelations of the Holy Spirit, the Bible may well be denominated 'Holy,' and said to be 'the Word of God,' 'God's Word written,' or 'Holy Writ;' terms which cannot be

affirmed to be clearly predicated of every statement and representation contained in every part of the Old and New Testament.

"The framers of the Articles have not used the word 'inspiration' as applied to the Holy Scriptures; nor have they laid down anything as to the nature, extent, or limits of that operation of the Holy Spirit.

"The caution of the framers of our Articles forbids our treating their language as implying more than is expressed; nor are we warranted in ascribing to them conclusions expressed in new forms of words involving minute and subtle matters of controversy.

"After an anxious consideration of the subject, we find ourselves unable to say that the passages extracted from Mr. Wilson's Essay, and which form the subject of this Article of Charge, are contradicted by or plainly inconsistent with, the Articles or Formularies to which the Charge refers, and which alone we are at liberty to consider.

"We proceed to the remaining Charge against Mr. Wilson, namely, that contained in the 14th Article.

"The Charge is, that in the portion of his Essay which is set out in this Article, Mr. Wilson has advisedly declared and affirmed, *in effect*, that after this life and at the end of the existing order of things on this earth there will be no judgment of God, awarding to those men whom He shall then approve everlasting life or eternal happiness, and to those men whom He shall then condemn everlasting death or eternal misery; and this position is affirmed to be contrary to the three Creeds, the Absolution, the Catechism and the Burial and Commination Services.

"In the first place we find nothing in the passages extracted which in any respect questions or denies that at the end of the world there will be a judgment of God awarding to those men whom He shall approve everlasting life or eternal happiness; but with respect to a judgment of eternal misery, a hope is encouraged by Mr. Wilson that this may not be the purpose of God.

"We think that it is not competent to a clergyman of the Church of England to teach or suggest that a hope may be

entertained of a state of things contrary to what the Church expressly teaches or declares will be the case; but the Charge is, that Mr. Wilson advisedly declares that after this life there will be no judgment of God awarding either eternal happiness or eternal misery,—an accusation which is not warranted by the passage extracted. Mr. Wilson expresses a hope that at the day of judgment those men who are not admitted to happiness may be so dealt with as that 'the perverted may be restored,' and all, 'both small and great, may ultimately find a refuge in the bosom of the Universal Parent.' The hope that the punishment of the wicked may not endure to all eternity is certainly not at variance with anything that is found in the Apostles' Creed, or the Nicene Creed, or in the Absolution, which forms part of the Morning and Evening Prayer, or in the Burial Service. In the Catechism the child is taught that in repeating the Lord's Prayer he prays unto God 'that He will keep us from all sin and wickedness, and from our ghostly enemy, and from everlasting death;' but this exposition of the Lord's Prayer cannot be taken as necessarily declaring anything touching the eternity of punishment after the resurrection.

"There remain the Commination Service and the Athanasian Creed. The material passage in the Commination Service is in these words: 'O terrible voice of most just judgment which shall be pronounced upon them, when it shall be said unto them, Go, ye cursed, into the fire everlasting which is prepared for the devil and his angels.' In like manner the Athanasian Creed declares that they that have done evil shall go into everlasting fire. Of the meaning of these words 'everlasting fire,' no interpretation is given in the Formularies which are referred to in the Charge. Mr. Wilson has urged in his defence that the word 'everlasting' in the English translation of the New Testament, and of the Creed of St. Athanasius, must be subject to the same limited interpretation which some learned men have given to the original words which are translated by the English word 'everlasting,' and he has also appealed to the liberty of opinion which has always existed without restraint among very eminent English divines upon this subject.

"It is material to observe that in the Articles of King Edward VI., framed in 1552, the Forty-second Article was in the following words:—

"'"*All men shall not bee saved at the length.*"—Thei also are worthie of condemnation who indevoure at this time to restore the dangerouse opinion, that al menne, be thei never so ungodlie, shall at lengtht bee saved, when thei have suffered paines for their sinnes a certain time appointed by God's justice.'"

"This Article was omitted from the Thirty-nine Articles of Religion of the year 1562, and it might be said that the effect of sustaining the Judgment of the Court below on this charge would be to restore the Article so withdrawn.

"We are not required, or at liberty, to express any opinion upon the mysterious question of the eternity of final punishment, further than to say that we do not find in the Formularies, to which this Article refers, any such distinct declaration of our Church upon the subject as to require us to condemn as penal the expression of hope by a clergyman, that even the ultimate pardon of the wicked, who are condemned in the day of judgment, may be consistent with the will of Almighty God.

"We desire to repeat that the meagre and disjointed extracts which have been allowed to remain in the reformed Articles, are alone the subject of our Judgment. On the design and general tendency of the book called 'Essays and Reviews,' and on the effect or aim of the whole Essay of Dr. Williams, or the whole Essay of Mr. Wilson, we neither can nor do pronounce any opinion. On the short extracts before us, our Judgment is that the Charges are not proved.

"Their Lordships, therefore, will humbly recommend to Her Majesty that the sentences be reversed, and the reformed Articles rejected in like manner as the rest of the original Articles were rejected in the Court below, namely, without costs; but inasmuch as the Appellants have been obliged to come to this Court, their Lordships think it right that they should have the costs of this Appeal.

"I am desired by the Archbishop of Canterbury and the Archbishop of York to state that they do not concur in those parts of this Judgment which relate to the 7th Article of Charge against Dr. Williams, and to the 8th Article of Charge against Mr. Wilson."

APPENDIX.

APPENDIX.

LONG *v.* BISHOP OF CAPETOWN.

1863.

THE following Members of the Judicial Committee were present at the Appeal:—

LORD KINGSDOWN.	SIR EDWARD RYAN.
DR. LUSHINGTON.	SIR JOHN T. COLERIDGE.

[This case, which was decided on June 24th, 1863, is not included in the body of this work, not being strictly an Ecclesiastical appeal. It came to the Privy Council from the Supreme Court at the Cape of Good Hope, to which resort was had by both the parties;[1] Mr. Long seeking protection from the proceedings of the Bishop, and the Bishop seeking the temporal authority necessary to enable him to carry his sentence of deprivation into effect. The case is of extreme importance as affecting Church discipline in those colonies in which no recognised status has been given to the Church by law.]

The following points may be taken as having been decided by this Judgment:—

1. Where a Colonial Bishop, having been appointed by Letters Patent, surrenders his Bishopric, and is re-appointed by other Letters Patent, any jurisdiction conferred by the former thereupon ceases.

2. Letters Patent issued by the Crown, after the establishment of a Constitutional Government in a Colony, are ineffectual to create any jurisdiction.

3. The Members of the Church of England, in places where there is no Church established by law, may adopt rules for enforcing discipline within their body, which will be binding on those who expressly, or by implication, have assented to them.

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[1] According to the forms of the Roman-Dutch law, in use at the Cape, both parties were plaintiffs and defendants. In "convention," as it is termed, Mr. Long prayed for redress from the Bishop's sentence. But the Bishop not only defended himself, but prayed in "reconvention" that the rights which he claimed might be affirmed by law.

The judgment in this case sufficiently explains the circumstances which led to the appeal. A few of the documents referred to in the judgment are added in the notes.

4. The decisions of a tribunal established to decide whether the rules of a lawful association have been violated by its members are binding, when it has acted within the scope of its authority, and has observed such forms as the rules require, if any rules are prescribed, or, if there be no rules, has proceeded in a manner consonant with the principles of justice.

5. A contract of a priest of the Church of England with his Bishop in a Colony, is to be construed with reference to the position in which he stands as a clergyman of the Church of England towards a lawfully appointed Bishop of that Church, and to the authority known to belong to that office in England; and a lawful cause of deprivation is such a cause as would authorize the deprivation of a clergyman by his Bishop in England.

6. Letters Patent empowering a Bishop to perform all the functions appropriate to the office of a Bishop in a Colony, do not confer power to convene a meeting of clergy and laity, to be elected in a certain manner prescribed by him, for the purpose of making laws binding upon Churchmen.

7. Such a meeting is not a synod, and its acts are illegal, if they purport, without the consent of the Crown or the Colonial Legislature, to bind persons beyond its control, and to establish new Courts of Justice.

8. The oath of canonical obedience does not mean that the clergyman will obey all the commands of the Bishop against which there is no law, but, that he will obey all such commands as the Bishop by law is authorized to impose.

9. The exercise of jurisdiction by a Bishop in the Colonies, when there is no law to guide him, should be by analogy with the course of proceedings in England, by which the judgment of impartial persons acquainted with the law is secured.]

The following Judgment was read by Lord Kingsdown, on June 24th, 1863:—

"This is an Appeal from a decision of the Supreme Court of the Cape of Good Hope in a suit between the Appellant, the Rev. Mr. Long, claiming to be the Incumbent of the parish of Mowbray, in that Colony, and the Respondent, the Lord Bishop of Cape Town. Mr. Long being in possession of the church of the parish of Mowbray, and in receipt of the income attached to the benefice, refused to obey certain orders which the Bishop, in what he considered the due exercise of his episcopal authority, thought fit to issue, and for such disobedience the Bishop issued against Mr. Long sentences, first of suspension, and afterwards of deprivation. The validity of these sentences, and especially of the last, was the question to be decided by the Court below, which, by a majority of two Judges to one, has held them to be valid.

"In the argument at our Bar many questions of great novelty and importance were raised and discussed with remarkable ability. Some of them were considered, and very justly, by the Counsel as seriously affecting the well-being of members of the Church of England in the Colonies and other dependencies of the Crown.

We propose to deal with these questions only so far as may be necessary for the purposes of the present decision, and to abstain as far as possible from saying anything which may prejudice cases that may hereafter arise.

"It is advisable, in order to make the reasons of our Judgment intelligible, to state in some detail the facts as they appear upon the record.

"The Bishopric of Cape Town was founded in the year 1847. At this time the legislative authority in the Colony of the Cape of Good Hope was vested in the Crown. There was no State Church; all denominations of Christians stood on an equal footing; there were no Ecclesiastical Courts as distinct from Civil Courts. The Supreme Court, under the Charter of Justice granted in 1832, had supreme jurisdiction in all causes—civil, criminal, and mixed—arising within the Colony, with jurisdiction over all subjects of the Crown, and other persons within the Colony.

"In this state of things Letters Patent were issued by the Crown dated the 25th September, 1847, erecting the Colony or Settlement of the Cape of Good Hope and its dependencies, and the Island of St. Helena, into a Bishop's See and Diocese, appointing the Respondent, Dr. Gray, to be ordained and consecrated Bishop of the See, and commanding his Grace the Archbishop of Canterbury to ordain and consecrate him accordingly. The Letters Patent purported to empower the Bishop to perform all the functions appropriate to the office of a Bishop within the Diocese of Cape Town, and especially to give institution to benefices; to grant licences to officiate to all rectors, curates, ministers, and chaplains, in all churches, chapels, and places where Divine service should be celebrated according to the Rites and Liturgy of the Church of England; to visit all rectors, curates, ministers, and chaplains, and priests and deacons in holy orders, of the United Church of England and Ireland, and to cite them before him, or before the officers whom he was authorized to appoint, and to inquire concerning their morals, as well as their behaviour in their several stations and offices. Power was given to the Bishop to appoint Archdeacons, a Vicar-General, Official Principal, Chancellor, Commissaries, and other officers; and it was provided that an appeal should be made from sentences of the subordinate officers so to be appointed, to the Bishop, and from sentences of the Bishop to the Archbishop of Canterbury. No Ecclesiastical Court was expressly constituted by these Letters Patent, nor was power

given to the Bishop to establish one; and it was declared that they should not extend to repeal, vary, or alter the provisions of any Charter whereby ecclesiastical jurisdiction had been given to any Court of jurisdiction within the limits of the said diocese.

"The Letters Patent provided that the Bishop of Cape Town should be subject to the Metropolitan See of Canterbury, in the same manner as a Bishop of any See within the province of Canterbury, and should take an oath of due obedience to him as Metropolitan; and they contained a clause that the Bishop might, by an instrument in writing under his hand and seal, addressed to the Archbishop of Canterbury, resign his office; and after acceptance of such resignation by the Archbishop, the Bishop was to cease to be Bishop of Cape Town to all intents and purposes. Dr. Gray having been duly consecrated by the Archbishop of Canterbury, and taken the oath prescribed, went out to the Cape to assume the duties of his office, and continued to discharge them till the latter end of the year 1853.

"At that time it was considered by the Queen's Government that the then Diocese of Cape Town was too extensive for one Bishop, and that it would be advisable to divide it and make it into three Dioceses, to be called Cape Town, Graham's Town, and Natal. With a view to this arrangement Dr. Gray, on the 23d November, 1853, resigned his Bishopric into the hands of the Archbishop of Canterbury, by whom the resignation was accepted, and Dr. Gray ceased to be Bishop of Cape Town.

"On the 8th December, 1853, new Letters Patent were issued, by which certain specified parts of the original Diocese of Cape Town were erected into a distinct and separate Bishop's See and Diocese, to be called thenceforth the Bishopric of Cape Town, and to this newly-constituted Bishopric Dr. Gray was appointed, and he was also appointed Metropolitan Bishop in the Colony of the Cape of Good Hope and its dependencies, and the Island of St. Helena. The new Letters Patent seem to have been in other respects in the same form with the old.

"But previously to the issuing of these Letters, the Crown had granted a Constitution to the Colony of the Cape. Representative institutions had been founded, and a Colonial Legislature established.

"Mr. Long was officiating in the Colony as a Minister of the Church of England before any Bishop was appointed there. He had been admitted into Deacon's orders for the Colonies by the

Bishop of London in 1844. In the year 1845 he went to Cape Town, and was appointed by the then Governor of the Colony to be Minister of the English Episcopal Church of Graaff-Reinet, his salary being paid partly by the Governor, partly by the Society for the Propagation of the Gospel, and partly by his congregation. There seems to have been no endowment of any kind attached to this church. He had at this time no other authority for discharging the duties of a Minister in that Church than the Holy Orders which he had received from the Bishop of London and the appointment of the Governor of the Colony.

"Soon after the arrival of the Bishop of Cape Town in the Colony in 1848, and while the first Letters Patent were in force, Mr. Long was ordained priest by the Bishop according to the form and manner of ordaining priests as contained in the Book of Common Prayer; and, on being so ordained, he took the usual oaths prescribed by the laws and usages in force in England, and amongst others the oath of canonical obedience to the Bishop, by which he engaged to pay to him true and canonical obedience in all things lawful and honest.

"On this occasion the Bishop granted, and Mr. Long accepted, a licence from the Bishop to officiate and have the cure of souls over the parish and district of Graaff-Reinet, the Bishop reserving to himself and his successors full power to revoke the licence whensoever he or they should see just cause so to do.

"In the year 1854 a clergyman of the English Church, named Hoets, built and proposed to endow an Episcopal Church in the parish of Mowbray, in the Colony of Cape Town, and to convey the church to the Bishop, upon certain terms agreed upon between them, and by a Notarial Act in the Dutch form, dated the 2d June, 1854, Mr. Hoets transferred in full and free property to the Bishop and his successors in perpetuity, for Ecclesiastical purposes, a piece of land therein described, 'with the church which the Appearer had lately erected thereon at his own cost and charge for the worship of Almighty God according to the Liturgy and Ritual of the Church of England, situate in the parish of Mowbray.'

"By a Notarial instrument of the same date, to which the Bishop and Mr. Hoets were both parties, the conditions on which the grant was made are stated.

"The first is that the church shall with all convenient speed be consecrated, and shall be at all times used and enjoyed by the parishioners of the parish of Mowbray free from any charge.

"Mr. Hoets covenants with the Bishop to pay a certain salary to the clergyman or incumbent to be appointed and instituted to the spiritual charge of the said church and parish in manner after mentioned, during the incumbency of the two first incumbents thereof, as and for a provision or endowment towards the stipend of such two first incumbents, and a mortgage is made by Hoets to the Bishop of certain bonds in order to secure the due payment of the stipend.

"The Bishop, in consideration of the premises, covenants with Hoets, that he, the Bishop, and his successors, will admit, institute, and appoint unto the said endowment, and unto the spiritual charge and care of the said church and parish, a Clerk, to be presented and nominated by Hoets (such person, being a priest in holy orders of the United Church of England and Ireland, or of any of the Colonial Churches in communion with the said United Church, and not subject to any spiritual or Ecclesiastical censure or other impediment), as the first incumbent of the said church and parish. And so in like manner upon the death, resignation, or removal for any lawful cause of the first incumbent, upon the like presentment of Hoets, to admit, institute, and appoint a second incumbent.

"There can be no doubt that by these deeds a trust was created between Mr. Hoets and the Bishop, and that the Bishop became trustee of the church and of the funds provided for its support, and held them in that character.

"On the 3d of June, 1854, Mr. Long and several of the parishioners of Mowbray presented a petition to the Respondent, as Bishop and Ordinary of the diocese, praying him to consecrate the church, and on the 6th of June his Lordship consecrated it accordingly, and signed an instrument under his episcopal seal declaring such consecration, and reserving to himself and his successors, Bishops of Cape Town, all ordinary and episcopal jurisdiction, rights, and privileges. On the same day his Lordship preached in the parish church, and referred to the Appellant as being henceforth the parish priest.

"There were, or were supposed to be, some impediments to the institution and induction of the new incumbent in the English form, and no such ceremonies took place, but Mr. Long entered into possession of the benefice, and discharged his parochial duties, receiving from the Bishop a licence to officiate and have the cure of souls within the parish and district of Mowbray. In this, as in his

former licence,[1] the Bishop reserved power to revoke it if he should see just cause, and Mr. Long on these occasions renewed his oath of canonical obedience to the Bishop.

"We will here observe, in order that we may not have occasion again to refer to the point, that we consider the good faith of the arrangements between Mr. Hoets and the Bishop to have required that the nominee of Mr. Hoets, when admitted by the Bishop to this church, should hold and retain it on the same terms as a clergyman in England regularly instituted and inducted, and that the Bishop, by means of this licence, obtained no right to suspend or deprive Mr. Long by the mere exercise of his discretion, or otherwise than for such cause as would have justified a sentence of suspension or deprivation in the case of a Clerk in full and lawful possession of his benefice. Indeed, it is due to the Bishop to say that we did not understand his Lordship to contend for more than this by his Counsel at our Bar.

"In the year 1856 the Bishop was of opinion that, for the purpose of settling some scheme of Church government which should be binding upon the religious community of which he was the head, it would be desirable to convene a Synod, consisting partly of clergy and partly of laymen, members of the Church within his Diocese. The measure had been in contemplation, and, indeed, under discussion, for several years before, and different opinions had been entertained both by clergymen and laymen as to its legality and its expediency.

"On the 15th November, 1856, the Bishop issued a pastoral letter, in which, after stating the reasons which induced him to believe that such a measure was expedient, if not indeed necessary, for the well-being of the Church in the Colony, and explaining the objects which might, in his opinion, be effected by means of a Synod, his Lordship proceeded to declare of what persons the Synod should be composed. These were to be, first, lay delegates, to be elected in

[1] The latter part of the licence is as follows:—"Provided, nevertheless, that nothing in this licence shall extend or be construed to extend to abridge our episcopal authority and office, and the episcopal office and authority of our successors in administering holy ceremonies and performing the functions belonging to us, or prevent the exercise of our episcopal authority in specially appointing and authorizing the archdeacons and other ministers by us directed and authorized to read and take part in Divine service in the said church and parish, and to preach therein on all proper occasions as we may order and appoint; hereby reserving to ourselves and our successors, Bishops of Cape Town, full power and authority to revoke these presents, and all things herein contained, whensoever we shall see just cause so to do.

the different parishes by adults, being, or at the time of the election declaring themselves to be, members of the Church of England, and of no other religious denomination. Secondly, duly licensed clergy, being in Priests' orders. Deacons were to be authorized to attend and speak, but not to vote.

"Some of the subjects to be brought under the consideration of the Synod were then enumerated, including matters not exclusively of ecclesiastical cognizance; as for instance, the tenure and management of Church property; questions relating to the formation and constitution of parishes; difficulties which had presented themselves with regard to marriages; divorces and sponsors; and, finally, the desirableness, or otherwise, of seeking to obtain the assistance of the Legislature to carry out the objects of the Synod.

"Mr. Long was summoned by the Bishop to attend the Synod, which was appointed to be held at the Cathedral Church in Cape Town on the 21st January, 1857, and he was requested to affix a notice of the intended meeting on his church-door, and to take the necessary steps for holding the election of a delegate for his parish.

"Mr. Long[1] and his parishioners were opposed to this measure. The parishioners held a meeting on the 22d December, 1856, at which they resolved that no delegate should be elected, and Mr. Long neither attended the Synod himself, nor took any steps to forward the election of a delegate.

"No attempt appears to have been made at this time by the Bishop to enforce obedience to his summons, but the Synod was

[1] The views of Mr. Long were thus stated in the pleadings before the Supreme Court of the Cape:—

"That, believing it to be contrary to the constitution and the laws and customs of the Church of England that such Synod or assembly should be held without the authority of the Crown or Legislature, and further believing that the laws attempted to be made at such Synod would not be binding on any member of the said Church who did not desire to be so bound by them; and, moreover, that the laws likely to be made by a Synod or assembly constituted in the mode proposed by the defendant would tend to abridge the liberties of ministers and members of the Church of England already in this colony, or likely to arrive here in future years, he declined to attend the said Synod, or in any way to be bound by or concerned with its decisions; and the plaintiff further says that he then informed the defendant that he did not consider it his duty to attend, and would not so attend."

It appears that other parishes and ministers were opposed to the meeting of the proposed Synod.

held, and was attended, as it appears, by many of the clergy and laity, and various resolutions were passed by them, which were termed 'Acts and Constitutions of the First Synod, held at Cape Town, January 21, 1857.'[1]

"These regulations provided that a Synod of the clergy should be convened by the Bishop once in three years. They provided for the mode of electing delegates from the different parishes, and required that on some Sunday, or other convenient day, during Divine service, each Minister should give notice of the day and place of meeting for such election in his parish or district, and should cause notice of the same to be fastened to the door of the church or chapel of the parish or district.

"The clergy and laity were ordinarily to sit and deliberate together, the Bishop presiding, and to vote as one body; but any member of the Synod might demand a vote by orders, in which case no resolution should be regarded as adopted by the Synod unless carried by a majority of both orders and assented to by the Bishop.

"Various rules were made with respect to the formation of parishes, and the institution and induction of clergy; and all Presbyters and Deacons before institution or induction, or before receiving a licence from the Bishop, and as a condition of receiving such institution, induction, or licence, were to sign a declaration that they would subscribe to all the Rules and Constitutions enacted by the Synod of the Diocese of Cape Town.

"A Consistorial Court was appointed for the trial of all offences against the Ecclesiastical laws of the Diocese, and various provisions were introduced with respect to the mode in which the trial should be conducted.

"The Synod had been convened without any express sanction of the Crown, and no attempt was made to obtain the assistance of the Legislature to carry into effect its objects. It was stated at the Bar that the Synod resolved that it would not be desirable to make any attempt for the purpose, but we do not find any Resolution to this effect amongst the printed papers.

"In 1860 the Bishop convened a second Synod, to be held on the 17th of January, 1861; and on the 1st of October, 1860, his Lordship

[1] Mr. Long attended the meeting, and handed in a written protest against its being held, on the ground of its illegality. He then withdrew, and, subsequently, took no part in its proceedings. He was joined in the protest by the Rev. Mr. Lambe, a clergyman of the diocese.

addressed a letter to Mr. Long,[1] enclosing a copy of a pastoral letter which he had issued, and also a copy of the printed Regulations adopted by the Synod for the election of Deputies. The pastoral letter referred to the Acts and Constitutions of the last Synod,[2] and mentioned as one of the subjects to which his Lordship would have to call attention, the Constitution of the Ecclesiastical Court.

"Mr. Long was of opinion[3] that the convening of this Synod without the authority either of the Crown or the local Legislature was

"1st October, 1860.

[1] "REVEREND AND DEAR SIR,—I forward herewith some copies of a pastoral letter addressed by me to the diocese, for distribution in your parish. You will see from it that I have summoned a Synod for the 17th January, 1861; and that I propose to hold a visitation in the Cathedral on the previous day. I shall feel obliged by your attending carefully to the enclosed printed regulations with regard to the election of delegates, and I shall feel thankful if you will forward to the Registrar of the Diocese, at an early day, intimation of any important motions which you may wish to submit to the consideration of the Synod. You will be good enough to consider this present note as your formal citation to the Synod and the Visitation.

"I am, reverend and dear Sir,

"Your faithful friend and brother,

"R. CAPETOWN."

[2] The fourth of such Acts and Constitutions provided that "Every adult male parishioner, being on the list of communicants, or who should have signed the declaration of Church membership sanctioned by the Synod, according to the schedule thereunto annexed, and not being under Church censure according to the second rubric before the Communion Service, should be entitled to vote for a representative of the Parish to which he belonged."

The declaration was as follows:—"I do declare that I am a member of the Church of the Diocese of Cape Town, in union and full communion with the United Church of England and Ireland, and that I belong to no other religious body."

The sixth paragraph, relating to the constitution of the Synod, provided that—"On some Sunday, or other convenient day, during Divine service, each minister should give notice of the day and place of meeting for such election in his parish or district, and should cause a notice of the same to be fastened to the door of the church or chapel of the parish or district; provided always that at least fifteen clear days should intervene between the day of giving notice and the day of election."

[3] "I cannot, my Lord, recognise a body which has, in my humble opinion, declared its secession from the Church of England in demanding a declaration from Churchmen that 'they are members of the Church of the Diocese of Cape Town, in union and full communion with the United Church of England and Ireland, and belong to no other religious body.' I do not belong to any religious body in communion with the United Church of England and Ireland, but to the Church of England and Ireland, in the diocese of Cape Town. Further, I cannot recognise a body which has constituted ecclesiastical courts for clergy and laity without the sanction of the Legislature; and I cannot but regard the 'act' requiring all newly-appointed ministers to subscribe to

an unlawful act on the part of the Bishop; that the Synod itself was illegal, and its acts of no validity; and he declined therefore to take any steps himself for calling a meeting for the election of Delegates in his parish; but he handed over the papers to the churchwardens and sidesmen, that they might act as they should think proper, informing them at the same time of his own views upon the subject.

"After some angry correspondence, in which, as usually happens, there are passages in the letters on both sides which the writers perhaps now regret, the result was that Mr. Long[1] refused to give the notice required of the intended election.

"On the 27th November, 1860, he was served with a citation signed by the Registrar of the diocese, by which he was cited to appear before the Bishop on Monday, the 4th February, 1861, to answer for having neglected and refused to obey the commands and directions of his Bishop to give notice of a meeting to be held 'in terms of a certain letter addressed and forwarded to you, and dated the 1st October, 1860, with the pastoral issued on the same day and therein inclosed.'[2]

the 'acts and constitutions' of the Synod as a condition of licence in the diocese, as a measure sanctioned neither by law nor usage in our Church, and an unwarranted clog upon a clergyman's liberty unknown in any English diocese. Holding such sentiments, then, your Lordship will perceive that were I to have called a meeting for the election of delegates in my parish, I should virtually have to acknowledge the 'acts and constitutions' of the Synod, part of which are appended to your pastoral, and which, as I before stated, I regard as the acts of an illegal body."

[1] The views of Mr. Long upon the proposed Synod are given in another letter written by him at this time to the Bishop. He states that the real point at issue is the lawfulness of the Synod; that in all dioceses in which such Synods are held they have the sanction of the Legislature and the Crown; and that if such sanction can be obtained, he will readily attend the meetings and convene his parishioners as required by the Bishop. The Bishop, on his side, insists on his right to compel Mr. Long's attendance, and characterises his criticism on the Declaration as "a daring and wanton charge," which, if made publicly, would lead to his being tried for it as a grave ecclesiastical offence. He also states that a continued refusal to attend the Synod must be regarded as nothing short of an act of schism.

[2] The Bishop wrote on the 6th of December, proposing to Mr. Long a private meeting in the presence of common friends, at which he might offer, if he pleased, apology or explanation for his conduct. This was declined by Mr. Long, who, however, afterwards resolved to appear at an informal meeting, the character of which is stated by the Bishop in the following letter:—

"Bishop's Court, Dec. 15, 1860.

"REV. SIR,—You again leave me till the last moment without replying to my letter. I have only time to say that you are not in the present state of the proceeding cited to a trial. If I should be compelled to do this it will be

"Certain clergymen, five in number, were named by the Bishop to be his Assessors; but his Lordship offered, if Mr. Long had any personal objection to any of them, to change their names for those of other clergymen who might be resident in the neighbourhood.

"On the 4th February, 1861, Mr. Long attended before the Bishop and his Assessors, and delivered in a letter signed by himself, stating, in respectful terms, the grounds on which he objected to give the required notice, and adding, that if obedience were still required to the Bishop's command in that respect, it was impossible for him to pay it.

"Mr. Long's counsel at the same time handed in a protest, signed by them, that no judgment or sentence pronounced by the Bishop as the judgment or sentence of any alleged Court was in any degree binding on Mr. Long, because no lawful authority was vested in the Bishop to hold, by himself or others, any Court or Courts competent to hear or determine any causes of what kind soever.

"The Court adjourned, as it seems, without hearing evidence; there was no question of fact in issue. The Assessors afterwards delivered their opinions in writing to the Bishop, and on the 8th February, 1861, the Bishop pronounced a sentence[1] suspending

a public one. What I have cited you to do now is to appear privately before me, that you may offer, if you are so inclined, explanations, apologies, or excuses for your conduct, and that I may endeavour to convince you of your violation of your duty to your Bishop and your Church in the course which you have taken. If I could succeed in this, and you should be led by God's grace to see how unjustifiable your conduct has been, I shall be prepared to overlook your fault and forgive you, as I have done before. If not, I shall be compelled to bring you to a public trial. To the private meeting I have told you that you may bring, if you wish it, a friend. As you ask for two, I will allow you to bring two; I will not allow you to bring more, to be present at a private meeting, nor will I allow reporters.

"I am, reverend Sir, yours truly,

"R. CAPETOWN."

[1] The sentence is as follows:—"Reviewing, then, this whole case as now before me, considering how open and long continued has been your resistance to lawful authority, how unprovoked has been this contest, how easily it might have been avoided, how fruitless have been the loving efforts made by others whose character and position you cannot but respect, to convince you of the false position you have taken up, seeing that the question which you have raised is no less than this, whether law and order or anarchy and confusion shall prevail in the Church, nay, whether there is any such thing as law amongst us; assured that there can be no doubt that the laws and customs of the Church of England justify your Bishop in the course which he

Mr. Long from the cure of souls, and the exercise of all ministerial functions and offices for a period of three months, and thenceforward until he should have expressed regret for his past disobedience, and his willingness to render obedience for the future.

"His Lordship added, from motives which do credit to his feelings, the following note to his Judgment :—

"'I have only to add that as you have a wife and children, I should be sorry to deprive you of any portion of your ecclesiastical income. You will be allowed to receive this, therefore, as heretofore, for the present.'

"This sentence was intimated to the churchwardens of the parish, and they were requested to provide a clergyman to perform duty in the church during Mr. Long's suspension. Mr. Long, however, considered the sentence to be a nullity, and he continued to officiate as usual, apparently with the concurrence of the churchwardens.

"On the 19th February, 1861, he was served with a citation by order of the Bishop to appear before his Lordship on Wednesday, the 6th March, to answer for having failed to render due and canonical obedience to the Bishop, and for acting in defiance of the laws of the Church and the authority of the Bishop. The citation recited the Bishop's order and Mr. Long's disregard of it, and required him to appear and answer for his contempt, and to hear and receive such Judgment as the Bishop might see right to pronounce, and as the exigency of the case might require or authorize.

"Mr. Long declined to attend this summons, and on the 6th March a sentence was pronounced by the Bishop, which, after reciting the various offences against his authority of which he considered Mr. Long to have been guilty, concluded in these terms :—

"'I, therefore, Robert, by Divine permission, Bishop of Cape Town, do, for these repeated acts of disobedience and contempt,

has pursued, the rubric after the Nicene Creed, as I pointed out to you at our meeting, expressly recognising his authority in this particular matter, and believing that you have no reasonable ground for thinking that you were called upon to do an illegal act, the evidence to the contrary, if you would have discussed the points with your Bishop, being conclusive, I have no alternative left but to pass sentence upon you for your repeated acts of disobedience, and your defiance of the laws of your Church and the authority of your Bishop. I therefore pronounce you suspended from the cure of souls, and from the exercise of all ministerial functions and offices, for a period of three months, from Friday, the 8th of February, 1861, until Wednesday, the 8th of May, 1861, and thereafter, until you shall have expressed regret for your past disobedience, and your willingness to render obedience for the future."

withdraw the licence of the Rev. William Long, and do deprive him of his charge and cure of souls in the parish or parochial district of Mowbray, and of all emoluments belonging to the same. And I do, moreover, hereby admonish the said William Long not to officiate again in the said church or parish, and warn him that if he should do so after this his deprivation, he will render himself still further liable to the censures of the Church.

'R. CAPETOWN.'[1]

"'Cathedral Vestry, March 6, 1861.'

"Notice was given of the sentence on the same day to Mr. Long and to the churchwardens of Mowbray, who were required to conform to it; and a gentleman of the name of Hughes was appointed[2] by the Bishop to officiate in the church till a new minister was appointed, and to receive one-half of the income.

"On the 7th March, Mr. Long and the churchwardens applied to the Supreme Court of the Colony of the Cape of Good Hope for an interdict to restrain the Bishop and Mr. Hughes from interfering with him in the performance of his lawful duties as incumbent of the parish of Mowbray, and from disturbing him in the enjoyment of his lawful emoluments as such incumbent.

"Some further proceedings took place in this matter, but the Plaintiffs were required to file a declaration in regular form for the purpose of trying the important questions in difference.

"The present suit was accordingly instituted.

"It was a proceeding, of course, in the forms of the Roman-Dutch Law; a claim in convention by the original Plaintiff, and a defence and claim in reconvention by the Defendant, so that, in fact, both parties were Plaintiffs and both Defendants.

"The claim of Mr. Long, after stating those several matters of fact on which he relied, insisted that he was aggrieved by the proceedings of the Bishop, and prayed the protection of the Court, and also a declaration of the law by the Court in conformity with his views on the several points in dispute; and lastly, that he was entitled of

[1] It is stated in the Judgment of the Chief Justice in the Supreme Court of the Cape, that it was in evidence that the Bishop was prepared to allow an appeal to the Archbishop of Canterbury, in the terms of his letters patent, against his decision, and to suspend the execution of the sentence in the meantime, if it had been demanded by Mr. Long.

[2] The Bishop desired the churchwardens to pay to Mr. Hughes the sum of 100*l.* payable from Mr. Hoets, and half the offertory money.

right, and without any licence other than his before-mentioned Letters of Order, and the presentation he had already received from Mr. Hoets, and the approval of such presentation publicly made known by the Defendant in June, 1854, to exercise all the lawful functions of minister and incumbent of St. Peter's Church, Mowbray.

"The Bishop filed an answer and plea in reconvention, by which, as Defendant, he pleaded the Letters Patent of 1847 and 1853, the licence granted by him, and accepted by Mr. Long, as officiating minister, both of Graaff-Reinet and Mowbray; he alleged that until authorized so to do by the Synod, and until the formation of rectories by the same authority as after mentioned, and until certain rules on that behalf had been framed, he could not give, nor had he in any previous instance given, institution to cure of souls, or induction to benefices, in any other way than by licences similar to that granted to the Plaintiff. He insisted that he cited the Plaintiff in accordance with the rules of the Synod, and in exercise of the authority belonging to him as Bishop, conveyed to him by the Letters Patent; that the sentences were Judgments or sentences Ecclesiastical or spiritual, so issued under the power and authority conveyed to him by the Letters Patent, or otherwise of right belonging to him as the Bishop of the Church of which the Plaintiff was a priest; and that the Plaintiff was, in consequence thereof, removed for lawful cause from the church of Mowbray; and he maintained, in conclusion, that the Court was not entitled to examine the sentence, but that if it were examined it ought to be affirmed.

"This was his defence. In reconvention he prayed, by his second plea, that it might be adjudged that the Letters Patent of the 25th September, 1847, and of the 8th December, 1853, are valid in law, and that they confer the rights and powers claimed thereunder, and that Ecclesiastical jurisdiction may thereby be lawfully exercised by him.

"By his last plea he prayed that the said Plaintiff in convention and Defendant in reconvention might be restrained by interdict, so long as the sentence of deprivation should continue and remain in force, from occupying or attempting to occupy the church of St. Peter's, Mowbray, or otherwise interfering with the duties of the minister of the said church.

"On the 15th February, 1862, the Court gave judgment against the Plaintiff in convention and for the Plaintiff in reconvention,

except as to his second plea in reconvention, to which we have already referred, and adjudged each party to pay his own costs.

[1] The opinions of the Judges in the Supreme Court of the Cape may be thus stated :—

Sir William Hodges, Chief Justice : By force of the letters patent, of September, 1847, and of December, 1853, and of his consecration, Dr. Gray became and is a Christian Bishop over a voluntary association of persons in this Colony, united together in spiritual communion with the United Church of England and Ireland, and who have agreed amongst themselves to maintain its doctrine and discipline. The Letters Patent give him power to perform all the functions peculiar and appropriate to the office of a Bishop. And Mr. Long, knowing this, accepted a licence from him containing the clause : " We hereby reserving to ourselves and our successors, Bishops of Cape Town, full power and authority to revoke these presents, and all things herein contained, whensoever we shall see just cause to do so." How far, then, can the Court interfere in a matter of ecclesiastical government among members of a voluntary religious community? It can only, as decided in similar cases by Lord Lyndhurst (*Warren* v. *Burton*) and by Lord Ivory in the *Cardross Case*, inquire, 1st, Whether the body which has made a decision (*i.e.* in this case the Bishop) has proper authority? 2nd, Whether the proceedings are regular according to the constitution of the Church or Sect? As to 1st, I cannot, looking to the authorities, for a moment doubt that a Bishop of the Christian Church may suspend or deprive a presbyter. As to 2nd, There is nothing to oblige the Bishop to act in any particular manner. He was not bound to act according to the Statutes in force in England ; and there is no statute or ordinance of the Colony on the subject. Further, I am of opinion that there was nothing illegal in the proceedings which the Bishop wished to initiate, unless the Synod had attempted anything to impair the laws of the Colony, *e.g.* to vest an Ecclesiastical Court with coercive jurisdiction.

Mr. Justice Bell : The broad question is, whether the Bishop lawfully suspended Mr. Long. Now, I hold the Letters Patent, both of 1847 and 1853, insufficient to enable the Bishop to appoint a Court for the trial of Ecclesiastical Causes ; I do not admit that the Church of England, properly so called, exists in the Colony ; the contract cannot be held to give Ecclesiastical jurisdiction such as this Court can recognise (since the presumed jurisdiction makes the same person prosecutor and judge) ; and the contract did not establish a jurisdiction such as that exercised in England (nor have the proceedings been in the English form). The sentences therefore both of suspension and deprivation are pronounced in a proceeding *coram non judice*. The Defendant had no jurisdiction to proceed personally against the Plaintiff ; and even if he had such jurisdiction, he has not exercised it properly.

Mr. Justice Watermeyer : Neither of the Letters Patent could give the jurisdiction claimed. But it is the duty of this Court to discern the law of the Church of England from the law of the Church Establishment of England. . . . Neither English Statutes nor English Canon-law, are law in this Colony, nor is foreign Canon-law ; but the relation between Bishop and Priest, proceeding from the Church of England to this Colony, must be governed, on the principle of a contract, by the English Ecclesiastical law, as far as it can be rationally applied. Mr. Long by ordination and the oath of canonical obedience has acknowledged the authority of the Bishop's *forum domesticum*, which is

"This was in effect a decision in all material points in favour of the Bishop, and Mr. Long has been admitted to appeal to Her Majesty. The case seems to have been very well argued in the Court below, and though there was some difference of opinion amongst the three Judges who decided it, no one who reads their opinions can fail to admire the great learning and ability which they have brought to bear upon the questions submitted to them, and the judicial temper and moderation which they have shown in a case calculated to produce great excitement in the Colony.

"The first question which we have to consider is, what authority did the Bishop possess under and by virtue of his Letters Patent at the time when these sentences were pronounced? The Judges below have been unanimous in their opinion:[1] 1st, that all jurisdiction given to the Bishop by the Letters Patent of 1847 ceased by

described (Report of the Commissioners on Ecclesiastical Courts, 1832, p. 54) as being under "little restraint from the forms observed in contentious suits in courts of justice." I take, then, the acknowledgment by a minister of the Church of England of a Bishop over him, where the Church of England is not established, to be an acknowledgment that the Bishop has jurisdiction over him, including the right of suspending and depriving. Such deprivation must be for a lawful cause: and if the Bishop had (as alleged) suspended Mr. Long for not doing an act clearly illegal, or an act violating the contract between the parties, the Court would not hold it good. But I must state distinctly that the instruction of the Bishop that Mr. Long should give notice of the Synod, was not an order to do something illegal, or contemplating illegality.

[1] The opinion of the Chief Justice at the Cape was that—"The status of the Right Rev. Defendant is that of a bishop over the diocese founded by the Letters Patent;" and, following a judgment of Lord Campbell in "*the Queen* v. *Eton College*" (27 Law J. Queen's Bench, 132), that "the jurisdiction exists only over those who voluntarily submit themselves to it."

The opinion of Mr. Justice Bell was that—"As the Act 13 Car. II. (which confirmed the abolition of the Court of High Commission) stands unrepealed, it was *ultra vires* for the Crown to give to the Defendant any ecclesiastical jurisdiction by the Letters Patent of 1847." Further, that "From the moment the Defendant completed his resignation he ceased to be Bishop under the Letters of 1847." And as to the Letters Patent of 1853, besides the objection which applies to those of 1847, they were open to another objection. "So far as they gave the Defendant Ecclesiastical jurisdiction, so far they legislated for the Colony; but, at the date of their issue, the Crown had already, by the grant of a constitution to the Colony, parted with the power of legislating for the Colony by Letters Patent."

The opinion of Mr. Justice Watermeyer was:—"The Bishop is not Bishop of Cape Town by virtue of the Letters Patent of 1847, but of those of 1853." And, "The instrument of 1853, by itself, clearly gives no ecclesiastical jurisdiction. It was issued after the constitution of the Colony had become law. It could have no legislative effect here."

the surrender of the Bishopric in 1853, and the issue of the new Letters Patent; and 2dly, that the Letters Patent of 1853 being issued after a Constitutional Government had been established in the Cape of Good Hope, were ineffectual to create any jurisdiction, ecclesiastical or civil, within the Colony, even if it were the intention of the Letters Patent to create such jurisdiction, which they think doubtful. In these conclusions we agree.

"Dr. Gray had been duly appointed and consecrated a Bishop of the Anglican Church in 1847, and such he remained after the resignation of his See: but by such resignation he surrendered all territorial jurisdiction and power of proceeding judicially *in invitos*, so far as such authority depended upon the Letters Patent of 1847. These points have not only been decided by the Court below, but have been embodied in their Judgment, by which they have expressly rejected the second claim above stated of the Lord Bishop.

"But a majority of Judges below has held that the defect of coercive jurisdiction under the Letters Patent has been supplied by the voluntary submission of Mr. Long, and that he is on that principle bound by the decision of the Bishop. This point we have next to consider.

"The Church of England, in places where there is no Church established by law, is in the same situation with any other religious body, in no better but in no worse position, and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them.

"It may be further laid down that where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation, then the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice.

"In such cases the tribunals so constituted are not in any sense Courts; they derive no authority from the Crown, they have no power of their own to enforce their sentences, they must apply for that purpose to the Courts established by law, and such Courts will give effect to their decision, as they give effect to the decisions

of arbitrators, whose jurisdiction rests entirely upon the agreement of the parties.

"These are the principles upon which the Courts in this country have always acted in the disputes which have arisen between members of the same religious body not being members of the Church of England. They were laid down most distinctly, and acted upon, by Vice-Chancellor Shadwell and Lord Lyndhurst in the case of Dr. Warren, so much relied on at the Bar, and the report of which in Mr. Grindwood's book seems to bear every mark of accuracy.

"To these principles, which are founded in good sense and justice, and established by the highest authority, we desire strictly to adhere, and we proceed to consider how far the facts of this case bring Mr. Long within their operation.

"To what extent, then, did Mr. Long, by the acts to which we have referred, subject himself to the authority of the Bishop in temporal matters? With the Bishop's authority in spiritual affairs, or Mr. Long's obligations *in foro conscientiæ*, we have not to deal.

"We think that the acts of Mr. Long must be construed with reference to the position in which he stood as a clergyman of the Church of England, towards a lawfully appointed Bishop of that Church, and to the authority known to belong to that office in England; and we are of opinion that by taking the oath of canonical obedience to his Lordship, and accepting from him a licence to officiate, and have the cure of souls within the parish of Mowbray, subject to revocation for just cause, and by accepting the appointment to the living of Mowbray under a deed which expressly contemplated as one means of avoidance the removal of the incumbent for any lawful cause — Mr. Long did voluntarily submit himself to the authority of the Bishop to such an extent as to enable the Bishop to deprive him of his benefice for any lawful cause, that is, for such cause as (having regard to any differences which may arise from the circumstances of the Colony) would authorize the deprivation of a clergyman by his Bishop in England. We adopt the language of Mr. Justice Watermeyer, p. 81, that 'for the purpose of the contract between the Plaintiff and Defendant, we are to take them as having contracted that the laws of the Church of England shall, though only as far as applicable here, govern both.'

"Is, then, Mr. Long shown to have been guilty of any offences

which, by the laws of the Church of England, would have warranted his suspension and subsequent deprivation? This depends mainly on the point whether Mr. Long was justified in refusing to take the steps which the Bishop required him to take, in order to procure the election of a delegate for the parish of Mowbray to the Synod convened for the 17th January, 1861.

"In what manner and by what acts did he contract this obligation? The Letters Patent may be laid out of the case, for if the Bishop's whole contention in respect of them be conceded, they conferred on him no power of convening a meeting of clergy and laity to be elected in a certain manner prescribed by him for the purpose of making laws binding upon Churchmen.

"A very elaborate argument was entered into at our Bar, in order to show that Diocesan Synods may be lawfully held in England without the licence of the Crown, and that the Statute with respect to Provincial Synods does not extend to the Colonies.[1]

"It is not necessary to enter into the learning on this subject. It is admitted that Diocesan Synods, whether lawful or not, unless with the licence of the Crown, have not been in use in England for above two centuries; and Mr. Long, in recognising the authority of the Bishop, cannot be held to have acknowledged a right on his part to convene one, and to require his clergy to attend it. But it is a mistake to treat the Assembly convened by the Bishop as a Synod at all. It was a meeting of certain persons, both clergy and laity, either selected by the Bishop, or to be elected by such persons and in such manner as he had prescribed, and it was a meeting convened not for the purpose of taking counsel and advising together what might be best for the general good of the society, but for the purpose of agreeing upon certain rules, and establishing in fact certain laws, by which all members of the Church of England in the Colony, whether they assented to them or not, should be bound.

"Accordingly, the Synod, which actually did meet, passed various acts and constitutions purporting, without the consent either of the Crown or of the Colonial Legislature, to bind persons not in any manner subject to its control, and to establish Courts of Justice for

[1] The Statute 25 Hen. VIII. c. 19. s. 1, enacts that the clergy shall not presume to "put in ure any constitutions or ordinances, provincial or synodal, or any other canons; nor shall insert, promulge, or execute any such canons, constitutions, or ordinances provincial," in convocation (which shall always be assembled by the King's writ), unless they have the King's assent to make and execute such canons and constitutions.

some temporal as well as spiritual matters, and in fact the Synod assumed powers which only the Legislature could possess. There can be no doubt that such acts were illegal.

"Now Mr. Long was required to give effect, as far as he could, to the constitution of this body, and to take steps ordered by that body for convening one of a similar nature. He was furnished with a copy of the Acts and Constitution of the last Synod, and he was requested to attend carefully to the enclosed printed regulations with regard to the election of Delegates.

"He clearly, therefore, was required to do more than give notice of a meeting, and he could not give the notice at all without himself fixing the time and place at which the meeting was to be held. He was required to do various acts of a formal character for the purpose of calling into existence a body which he had always refused to recognise, and which he was not bound by any law or duty to acknowledge.

"The oath of canonical obedience does not mean that the clergyman will obey all the commands of the Bishop against which there is no law, but that he will obey all such commands as the Bishop by law is authorized to impose; and even if the meaning of the rubric referred to by the Bishop in his case[1] were such as he contends for,—which we think that it is not,—it would not apply to the present case, in which more was required from Mr. Long than merely to publish a notice.

"We are, therefore, of opinion that the order of suspension issued by the Bishop was one which was not justified by the conduct of Mr. Long, and that the subsequent sentence of deprivation founded upon his disobedience to the order of suspension must fall with it.

"It was strongly pressed, both before us and in the Court below, that supposing these sentences to be erroneous, Mr. Long had no remedy against them except by Appeal to the Archbishop of Canterbury under the provisions of the Letters Patent. What authority his Grace might possess under the Letters Patent, or otherwise, to entertain such an Appeal if it had been presented, it is unnecessary, and we think it is inexpedient, to discuss. It is sufficient to say no such Appeal has been presented, and that the

[1] The rubric after the Nicene Creed in the Communion Service, which prescribes that "Nothing shall be proclaimed or published in the Church during the time of Divine Service but by the minister; nor by him anything but what is prescribed by the rules of this book or enjoined by the Queen or by the Ordinary of the place."

suit in which this Appeal is brought respects a temporal right, in which the Appellant alleges that he has been injured. It calls for a decision as to the right of property, and involves the question whether Mr. Long has ceased by law to be what in England is termed *cestui que* trust of funds of which the Bishop is trustee. Whatever else Mr. Long may by his conduct have done, we cannot hold that he has precluded himself from exercising the power which under similar circumstances he would have possessed in England, of resorting to a Civil Court for the restitution of Civil rights, and of thereby giving to such Courts jurisdiction to determine questions of an ecclesiastical character essential to their decision. Indeed, in this case the Appellant and Respondent have alike found it necessary to call upon the Civil Court to determine the right of possession of the Church of Mowbray.

"We think that even if Mr. Long might have appealed to the Archbishop, he was not bound to do so; that he was at liberty to resort to the Supreme Court; and that the Judges of that Court were justified in examining, and, indeed, under the obligation of examining, the whole matter submitted to them. We, of course, are in the same situation; and after the most anxious consideration we have come to the conclusion that the sentence complained of cannot be supported, and therefore we must humbly advise Her Majesty to reverse it, and to declare that Mr. Long has not been lawfully removed from the Church of Mowbray, but remains Minister of such church, and entitled to the emoluments belonging to it.

"Being of this opinion, we are relieved from the necessity of considering, as a ground of our decision, whether the course adopted by the Right Reverend Respondent in the proceedings against Mr. Long was in all respects proper, and whether the proceedings themselves, if the Bishop be regarded as acting and entitled to act with the authority of a Visitor sitting *in foro domestico*, were conducted with that attention to the rules of substantial justice and that strict impartiality which are necessary to be observed by all tribunals, however little fettered by forms. Much argument was addressed to us at the Bar in this part of the case, and it would not be proper to pass it altogether without notice; and first with respect to the suspension, and the constitution of the tribunal for the trial of Mr. Long on the first charge against him.

"It cannot be held that all the provisions which would have

been applicable to such a case under the Church Discipline Act in England were necessary to be observed in the Colony. This was impossible, but care should have been taken to secure, as far as possible, the impartiality and knowledge of a judicial tribunal. Here the Bishop was not merely in form but substantially the prosecutor, and a prosecutor whose feelings, from motives of public duty as well as from the heat necessarily generated in the purest minds by a long and eager controversy, were deeply interested in the question. It was, perhaps, necessary that he should preside as the Judge before whom the cause was heard, and by whom the sentence was pronounced; but he should have procured, as a Bishop in England under such circumstances would have done, the advice and assistance, as Assessors, of men of legal knowledge and habits, unconnected with the matter in dispute, and have left it to them to frame the decision which he would afterwards pronounce. But instead of adopting this course, he selected as assistants three gentlemen, all Clergymen sharing his own opinions on the subject of controversy, and all themselves members of that Synod which Mr. Long was accused of treating as illegal.

"Mr. Long was cited for refusing to give the required notice, but the sentence was not grounded entirely on this charge. The protest which he had given in by his Counsel against the proceedings was treated as a very grave offence. The Bishop, in speaking of it, says—

"'To put in such a document is virtually to reject Episcopacy and the Church, and to stop on the very confines of schism, if not to have overstepped the line.'

"Mr. Long's conduct at a private meeting with the Bishop is discussed, as to which there is great doubt what really took place, and no regular evidence appears to have been produced, or was in fact admissible, for it was not to the point in question; and from the language of the Bishop in delivering his Judgment it may be inferred that the sentence against Mr. Long was not founded entirely on the only charge which he had been summoned to meet.

"The proceedings which led to the subsequent deprivation are open to no less objection than those which resulted in the suspension.

"The Bishop had declared before the first Synod that there were no rules or proceedings for trying ecclesiastical offences, and one of the objects of the Synod was to supply the deficiency. The

Synod had established a Consistorial Court and certain regulations by which the trials of clergymen and of laymen before such Court should be guided.

"These regulations had amongst other things provided that no sentence of deprivation should be pronounced by any persons whatever, but only by the Bishop with the assistance of the Chancellor of the diocese, or, in case there be no such officer, some legal adviser whom he may see fit to appoint. The Bishop insisted that Mr. Long was bound by the rules established by this Synod, and must, therefore, it should seem, have considered himself bound by them; and yet, without any regard to these rules, without calling in the assistance of any legal adviser whatever, without any analogy to the course of proceedings in England by which the judgment of impartial persons acquainted with the law is secured, the Bishop pronounces sentence of deprivation.

"On this occasion, as on the former, the sentence seems to have been founded on what are termed repeated acts of disobedience and contempt by Mr. Long, instead of on the single charge which he was called upon by the citation to meet.

"We cannot say, therefore, that the proceedings in this case have been conducted in a proper manner, though our Judgment rests on the other grounds already stated.

"We have been much embarrassed by the question how we ought to deal with the costs in this case. We do not doubt that the Bishop has acted in the conscientious discharge of what he considered to be his public duty, and he has succeeded, at great personal trouble and expense, in bringing this contention in the Court below to a favourable issue. On the other hand, it is impossible not to feel that Mr. Long has been subjected to probably not less trouble and expense by a course of proceeding on the part of the Bishop which we have been obliged to pronounce not warranted in law.

"Feeling the hardship of the case upon the Right Reverend Respondent, we still think that we are bound to award the costs of the suit and of the Appeal to the Appellant. We cannot, of course, suggest to Her Majesty any consideration of what it may be fit to do, at the expense of the public; for this is beyond our province. But it is not beyond our province to observe that the Lord Bishop has been involved in the difficulties by which he has been embarrassed in a great measure by the doubtful state of the law and by the circumstance that he, not without some reason, considered the

Letters Patent under which he acted to confer on him an authority which, at the time when he acted under them, Her Majesty had no authority to grant, and that either in this or in some other suit it was important to the interests of the Colony generally, and especially of the members of the Church of England within it, that the many questions which have arisen in this case should, as far as possible, be set at rest."

WHISTON'S CASE.

[It has been thought well to notice this case, because it is frequently referred to in the cases reported in the body of the work, and because it illustrates many points of importance in connexion with the Appellate Jurisdiction in the Church of England, especially the question of the authority of Convocation, and the mode of proceeding before the Court of Delegates.]

Mr. Whiston was the defendant in legal proceedings before three distinct bodies. 1st. Before the Vice-Chancellor and Heads of Houses at Cambridge, by whom he was banished from the University. 2d. Before Convocation. 3d. Before the Court of Delegates. It is proposed to give some account of each.

I.

MR. WHISTON'S BANISHMENT FROM CAMBRIDGE.

The history of this transaction is detailed by Mr. Whiston himself, in the "Account of his Prosecution and Banishment from the University of Cambridge," which he wrote in 1711, and published as an appendix to the work, entitled, "A Historical Preface," and which he afterwards republished on the occasion of Dr. Bentley's condemnation in 1718.

He states that he, being then Lucas Professor of Mathematics, was summoned, without previous notice, on a Sunday afternoon in the year 1710, to the private room of the Vice-Chancellor, and there accused of having preached false doctrine as to the divinity of Christ. On subsequent occasions, before the Vice-Chancellor and Heads of Colleges, affidavits as to his sermons at various churches in Cambridge were brought forward, and a sentence of banishment was passed upon him.

The Statute of the University under which this was done was cap. 45, De Concionibus. It related to sermons before the University; but it appears to have been interpreted as including sermons in general. After prescribing the rota of University preachers, it goes on as follows: "Prohibemus ne quisquam in concione aliquâ,

in loco communi tractando, in Lectionibus publicis, vel aliter publicè infrà Universitatem nostram, quicquam doceat, tractet, vel defendat contra religionem vel ejusdem aliquam partem in regno nostro publicâ auctoritate receptam et stabilitam. . . . Qui contra fecerit errorem vel temeritatem suam Cancellarii jussu cum assensu majoris partis Præfectorum Collegiorum revocabit et publicè fatebitur. Quod si recusaverit, aut non humiliter eo modo quo præscribitur perfecerit, eâdem auctoritate à Collegio suo perpetuo excludetur et Universitate exulabit."

Mr. Whiston complied with the sentence, but appears to have gone to Cambridge from time to time, and to have thought that he might keep his professorship. The University authorities, however, determined to fill up the professorship, and proceeded to elect a successor to Mr. Whiston; and an application was made to the Court of Chancery for power to deprive the expelled professor of the emoluments of his office. The Statute of the Lucas Professorship gives power to the Vice-Chancellor, with the majority of the Heads of Houses, to proceed against the holder of the office in case of his being guilty of certain crimes, amongst which heresy and schism are specified; and, if he prove incorrigible, to banish him from the University, "sine spe regrediendi aut commodum aliquod ulterius percipiendi."

Upon the matter being brought before the Court of Chancery, Mr. Whiston hoped that it would have been considered upon its merits. "But instead of a hearing," he says, "we soon found that the Lord Chancellor Harcourt would take it for granted, without a distinct hearing, that what the Heads of the University had done was within their power to do, and so was done legally. Nay, he was pleased, though unwillingly, to give the University costs against me for this very and only reason, as he told the Court, that I had obliged the University to bring a cause before him in judgment, which he could not hear."

After this, Mr. Whiston made a petition to the Vice-Chancellor and Heads of Houses for an allowance out of the funds of the professorship, and for a remission of the costs, which the Lord Chancellor had said the University ought not to demand. But no reply was given him. Mr. Whiston having removed to London, resided, with his family, at Cross Street, Hatton Garden.

II.

PROCEEDINGS AGAINST MR. WHISTON BEFORE CONVOCATION.[1]

In the end of the year 1710, the Government having been persuaded to allow the Convocation to meet for the transaction of business, that body was summoned by a letter from the Queen. The letter contained allusions to the dangers of the Church, which were meant, as she subsequently declared,[2] to apply specially to the publications of Mr. Whiston, one of which, called "A Historical Preface,"[3] had lately excited great alarm, and had been dedicated to Convocation by the author.

It was thought at first that a Committee would be appointed to examine Mr. Whiston's writings; but the Lower House, on Friday, March 9th, 1710–11, agreed to a Motion for an Address to the Upper House, presenting the book to the Bishops as containing opinions "directly opposite to the fundamental articles of the Christian religion."

Before the Address came up to the Bishops,—March 14th,—the Bishop of Bath and Wells made a vehement speech, and moved that the house proceed against Mr. Whiston, as a Court. This was lost, but a Committee was appointed to meet on the 17th at the Bishop of Lincoln's. On the 16th, the Address from the Lower House came up; and a Motion was made that Mr. Dodwell's book on the Natural Mortality of Souls should be referred to the same Committee. On the 17th the Committee resolved: First, "That the House can act as a Court." Second, "That since the Historical Preface was dedicated to them, they ought to take notice of it."

On April 11th (after Easter) the Archbishop, being confined to his house by the gout, sent to the Upper House a letter in which he stated that there were two points to consider: I. The censure of the Book; with a view to which passages should be selected from the work itself; and the parts of Scripture, of the decrees of the Council of Nice, and of the Articles of the Church of England, upon which the charge of Heresy might be grounded, should be

[1] The account of these proceedings is taken from the 2d Appendix to the Historical Preface, in which Mr. Whiston states the facts with every appearance of truthfulness, though some expressions are no doubt coloured by his feelings.

[2] In the letter to the Archbishop of Canterbury enclosing the opinion of the Judges. See *infrà*.

[3] A Historical Preface to Primitive Christianity revived.

set against them. II. The censure of the person. The difficulties as to Convocation acting as a Court were: (1) That it was a final Court, from which 25 Hen. VIII. c. 19, provided no appeal, and it was doubtful whether a prosecution without Appeal to the Crown was consistent with 1 Eliz. c. 17. (the Act of Supremacy) and with 25 Hen. VIII. c. 19. (2) That there had been no exercise of such judicature for a hundred years; and 16 Car. I. c. 11, provides that no Court similar to the High Commission shall be erected, and all Commissions erecting such a Court shall be void. (3) In the Act taking away the writ De Hæretico Comburendo (29 Car. II. c. 9) it was doubtful whether the reservation which was made of the powers of the Ecclesiastical Courts extended to Convocation. (4) When books were brought before Convocation in 1689, Convocation answered that they were aware that there were bad passages in them, but that there were Courts for those purposes; and that the Lawyers' opinions "ferunt non esse conveniens in præsentiâ sese his rebus immiscere." Hence the better course would seem to be that the Archbishop should hold a Court of Audience assisted by the Bishops, according to 23 Hen. VIII. c. 9, § 13, from which there would lie an Appeal to the Delegates: or that the Bishop of the Diocese should cite Mr. Whiston and try him in his own Court. The two last courses were preferable, as there was no doubt of their legality.

On the next Friday (13th April) there was a division in the Upper House on the question as to whether the House should proceed to act as a Court without addressing the Queen for the opinion of the Judges; when there appeared, for the proposal, Bishops of London, Rochester, Bath and Wells, and St. David's; neutral, Bishop of Bristol; the rest for the Archbishop's plan. On which the Committee drew up the Address.

On Tuesday, April 17th, 1711, the Address of Convocation was presented to the Queen.

It begins by stating that Mr. Whiston has maintained tenets contrary to Religion, and blasphemous assertions against the doctrine of the Trinity, contradictory to the Nicean and Athanasian Creeds; and that the House consider themselves bound in duty to repress the said blasphemy, and to call Mr. Whiston before them, in order either to his amendment or to his exclusion from the communion of the Church of England, but that they are hindered by doubts on the following points: (1) Since the Court of Convocation is final and does not admit of the Appeal

provided by 25 Hen. VIII. c. 19, it is doubtful whether a prosecution before it, which gives no Appeal to the Queen, is consistent with 1 Eliz. c. 1, 17, by which all jurisdiction for repressing Heresies and Schisms is annexed to the Imperial Crown of the Realm; and it is also doubtful how far such a Prosecution is consistent with 25 Hen. VIII. c. 19, which does not mention Convocation in the matter of Appeals to be made. The Address, therefore, humbly requests Her Majesty to lay the case before the Judges for their opinion "how far the Convocation, as the law now stands, may proceed in Examining, Censuring, and Condemning such Tenets as are declared to be Heresy by the Laws of the Realm: together with the Authors and Maintainers of them."

The Queen having submitted the questions thus raised to the Judges and Law Officers of the Crown, two answers were returned, dated May 5th, 1711.

I. Four of the Judges[1] gave their opinions against the jurisdiction of Convocation. Their views were, in substance, as follows:

Since the Statutes 23 Hen. VIII. c. 9 (against citing out of the Diocese) and 24 Hen. VIII. c. 12, and 25 Hen. VIII. c. 19, "the Convocation hath not any jurisdiction originally to cite before them any person for Heresy or any other Spiritual offence, which, according to the Laws of the Realm, may be cited, censured, and punished in the respective Ecclesiastical Courts, and Jurisdictions of the Archbishops, Bishops, and other Ordinaries, who, we conceive, have the proper Judicature in those Cases; and from whom and whose Courts the parties accused may have their appeals; the last resort wherein is lodged in the Crown." No notice is taken of Convocation in 23 Hen. VIII. c. 9, either as to Jurisdiction or as to Appeals.

This Statute, and the others (24 and 25 Hen. VIII.) being for the benefit of the subjects of the Realm, they cannot be deprived of the benefit of them by the pretended Jurisdiction of Convocation, from which no instance of an Appeal can be found; nor have any precedents for censuring offenders been found during the 180 years since the Reformation. Such a power, if allowed, would invade the ordinary Jurisdiction of the Archbishops and Bishops, which are preserved by 16 Car. I. and 13 Car. II. c. 12, and 29 Car. II. c. 9, which takes away the writ De Haretico Comburendo; in none of which is mention made of Convocation. Further, by

[1] Ward, Dormer, Blencowe, and Lovell.

the "Bill of Rights," 1 Wm. & Mary, it is enacted "that the Commission for erecting the late Court of Commission for Ecclesiastical Causes and all other Commissions and Courts of a like nature are illegal and pernicious."

The four Judges, however, add, that they conceive that heretical tenets and opinions may be examined and condemned in Convocation, authorized by Royal Licence, without censuring the authors and maintainers of them.

II. Eight of the Judges,[1] and the Attorney and Solicitor-General, gave their opinion in favour of the Jurisdiction.

"We are of opinion that of common right there lies an appeal from all Ecclesiastical Courts in England to your Majesty, in virtue of your Supremacy in Ecclesiastical affairs, whether the same be given by express words of Act of Parliament or not; and that no Act of Parliament has taken the same away. And, consequently, that a prosecution in Convocation, not excluding an appeal to your Majesty, is not inconsistent with the Statute 1 Eliz. 1, but reserves the Supremacy entire."

The questions put by Convocation are, (1) whether Jurisdiction to condemn false tenets and their maintainers could ever be exercised by Convocation; (2) whether it has been taken away by Act of Parliament.

(1) All the law-books speak of such a power as residing in Convocation; (2) and as we find nothing in the Statutes mentioned by Convocation to the contrary, nor in other Acts of Parliament, "we are of opinion that such Jurisdiction, as the law now stands, may be exercised in Convocation."

"But this being a matter which, upon application for a prohibition on behalf of the persons who shall be prosecuted, may come in Judgment before such of us as have the honour to serve your Majesty in places of Judicature, we desire to be understood to give our present thoughts with a reserve of an entire freedom of altering our opinions, in case any records or proceedings which we are now strangers to shall be laid before us, or any new considerations, which have not occurred to us, be suggested by the parties or their Counsel, to convince us of our mistake."

These opinions having been given, the Queen, in a letter dated St. James's, May 8th, 1711, transmitted them to the Archbishop, saying, "We are pleased to find that a Jurisdiction in matters of

[1] The names signed are those of Trevor, Parker, Powell, Powys, Berry, Tracy, Price, Eyre, Northey, Raymond.

Heresy and Condemnation of Heretics is proper to be exercised by Convocation; and we cannot doubt that Convocation may now be satisfied they may employ the power which belongs to them in repressing the impious attempts lately made, which was one of the chief ends we proposed to ourselves in assembling them. We trust that these our Royal Intentions, so often signified, will not be without effect." The Archbishop was desired to communicate the Letter and Opinions to both Houses.

The Queen's letter having been communicated to both Houses on May 11th, together with the opinions of the Judges, a Committee of both Houses was named, consisting of two Bishops and the Prolocutor and four members of the Lower House. Their report was embodied in the Judgment which was afterwards passed. Before it was given in, Mr. Whiston requested to be heard in his defence; but his request not having been attended to, he published the defence which he had intended to deliver.

The Judgment was as follows:—

"The Judgment of the Archbishop and Bishops and the Clergy of the Province of Canterbury, in Convocation assembled, concerning divers Assertions contained in the books lately published by William Whiston.

"Whereas great offence hath been given to the Church of God by several Writings published by William Whiston, and particularly by a Book lately dedicated by him to the Convocation of this Province; wherein that rash and insolent Writer declares, with the utmost assurance, that the Arian Doctrine concerning the Trinity and Incarnation is the Doctrine of our Blessed Saviour, His Apostles, and the first Christians; and very uncharitably insinuates, that all who have considered these matters want nothing but the Courage to own themselves of the same Opinion;

"We have thought ourselves obliged, in maintenance of our most Holy Faith, and for the Vindication of our own sincerity, for checking (if possible) the Presumption of this Author, and from preserving others from being seduced by him, to compare the dangerous Assertions he has advanced with the Holy Scriptures, the two first General Councils, and Liturgy and Articles of the Church of England, in order to give our Judgment upon them."

[Here follow fifteen quotations from the Historical Preface and Reply to Dr. Allix, almost identical with those embodied in the Articles before the Delegates. The texts of Scripture which the Committee had proposed to compare and oppose to these passages

were dropped in the Debate. Many other passages condemned by the Bishops were dropped by the Lower House.]

"We do declare that the above-mentioned passages, cited out of the books of William Whiston, do contain assertions false and heretical, injurious to our Saviour and the Holy Spirit, repugnant to the Holy Scriptures, and contrariant to the Decrees of the two first General Councils, and to the Liturgy and Articles of our Church.

"And we do earnestly beseech all Christian people, by the mercies of Christ, to take heed how they give ear to these false doctrines, as they tender the honour and glory of our Saviour and the Holy Spirit, the preservation of the purity of the Gospel, and the peace of the Church.

"And whereas the said William Whiston, the better to support his heretical opinion, speaking of a book commonly called the Apostolical Constitutions, hath these words:—

[Here follows the assertion as to the authority of the Apostolical Constitutions, also cited in the Articles before the Delegates.]

"We cannot but declare this assertion, advanced concerning a book which was never yet acknowledged as part of the Canon of Scripture by any general Council, nor received as such in any Christian Church, to be highly absurd and impious, tending to create in the minds of Christians great uncertainties as to their Rule of Faith which was once delivered to the Saints, and is preserved in the books of the New Testament received in our Church."

This Judgment having been agreed to by both Houses, the Archbishop, who was disabled by the gout, sent it to the Queen for her assent. The Queen said that she would consider it, but sent no answer, and the Convocation was prorogued. At their next meeting, at the end of 1711, two Bishops were sent to ask for an answer; but the Queen, says Burnet, "could not tell what was become of the paper which the Archbishop had sent her: so a new extract was sent to her; but she has not yet thought fit to send any answer to it."

This is the end of Mr. Whiston's account. He, in his Memoirs, quotes Bishop Burnet's account of the result as true. It does not appear whether the Convocation intended to go on to censure Mr. Whiston himself, or to condemn him to degradation from the ministry or excommunication. It is possible that they may have intended to take some further steps if the Queen had responded to their address. But it is also very possible that, as Mr. Whiston

held no office or preferment, they may have been content with the Judgment upon his doctrine. It is probable that the reasons which Burnet[1] reports as having determined the Upper House to proceed at first merely to condemn the doctrines had considerable force. It was doubted, he says, who ought to form the proposed Court of Convocation—whether the Bishops only, or some of the Lower House also; and it was urged that, in case of an appeal from their sentence, there would be no Bishops to sit in the Court of Delegates, unless the Archbishop of York and the northern Bishops were to be set to review the Judgment of the Archbishop of Canterbury and all his suffragans. It should be noticed, also, that no licence appears to have been given by the Queen for the proceeding which was proposed: and it might well be questioned whether the general leave to proceed to business or the informal letter in which the Queen sent to the Archbishop the opinion of the Judges would of themselves authorize it; while the enunciation of a substantive and binding decision on doctrine would have little differed from the making of a provincial ordinance, for which a special licence was confessedly necessary. These reasons may account for a matter begun with so much confidence, ending so weakly. "So Whiston's affair," says Burnet, "still sleeps, though he has published a large work, in four volumes octavo, justifying his conduct."

III.

PROSECUTION OF MR. WHISTON BEFORE THE COURT OF DELEGATES.

Dr. Pelling, Rector of St. Ann's, Westminster,[2] came forward as voluntary prosecutor. The account of the commencement of the proceedings is given in a publication written by Whiston, but anonymously, entitled, "Reasons for not proceeding against Mr. Whiston by the Court of Delegates; in a letter to the Rev. Dr. Pelling, Rector of St. Ann's, Westminster. By a Lover of Truth and True Religion."

"The Reader is therefore to know that you, Sir, though you were entirely unacquainted with Mr. Whiston, and before you ever so much as desired any private Discourse with, or gave any, either private or publick, admonition to him, did yet, the last winter, offer yourself as a voluntary prosecutor or informer against him for the

[1] History of His Own Time, vi. 56.

[2] St. Ann's, Soho.

supposed crime of heresy. This was done before Dr. Harward, Commissary of the Dean and Chapter of St. Paul's, within whose peculiar Jurisdiction it seems Mr. Whiston's habitation is. Dr. Harward, upon consideration of the nature of the cause, and its legal punishment, (which is, at the very first, Degradation from the ministerial function,) declared, that because he was a layman himself, and had not his commission from any Bishop, it was not in his power to degrade a clergyman; and by consequence it was not in his power to judge of the crime of heresy, whereto that degradation belonged. So Dr. Harward refused the Cause, but in such a manner that he sent it by Petition to the Dean of the Arches, Dr. Bettesworth, as the proper Superior Judge, to whom he supposed it must now belong. But the Dean, upon hearing the Cause, gave it for his Opinion and Determination, that this matter not coming to him by Appeal, as Causes ought to do in his Court; and the Cause itself having been already taken under the cognizance of Convocation, nay, and belonging properly to the Bishop of London's Jurisdiction, he could not receive it in this first instance, and so dismissed it. Upon this second disappointment, after some delay, you, Sir, procured the Lord Chancellor to appoint a Court of Delegates, which is the last usual resort in Causes of Appeals, to determine whether Dr. Bettesworth had denied Justice in this Cause or not: without any direct regard further to Mr. Whiston himself or his Cause.

"The Delegates appointed were, the Bishops of Winton, Bath and Wells, Hereford, St. David's, and Chester, the Lord Chief Justice Trevor, Mr. Justice Tracy, and Mr. Baron Price, Drs. Wood, Pinfold, Parke, Phipps, and Strahan. The Bishops and Civilians had two preliminary hearings at Doctors' Commons, *ad informandum* as the term is; and at last, July 1st, the Judges met them at Serjeants' Inn, and all heard the Cause pleaded at large both by Civilians and Common Lawyers. Upon which they came to a final Determination and Judgment, viz. that Dr. Bettesworth had given a false sentence; that the Cause did lie before him, and that he ought to have proceeded therein. Nay, what is most extraordinary of all, and was very surprising to not a few skilled in such matters, the majority of the same Court agreed to retain the Original Cause itself in the first instance; though under pretence that it came incidentally before them by way of Appeal. Accordingly they ordered a citation for Mr. Whiston to appear before them on the first Court day of the next term, on Monday, October 26th, between

3 and 5 of the clock in the afternoon, in the Hall of Doctors' Commons. This citation was delivered to him October 12. On the day appointed he came by 4 o'clock; but the Court was then risen, and had declared him guilty of contempt."

Whiston goes on to complain of the Cause having been retained before the Delegates, on the ground that he had not been made a party to the suit, which related to Dr. Bettesworth: and that the Final Court of Appeal, by thus taking up the principal cause from the beginning, was asserting an original jurisdiction, which made it as dangerous to liberty as the Court of High Commission. The course, however, which was followed by the Delegates in this instance was in conformity with the usual practice of the Ecclesiastical Courts, according to which, in case of an appeal on a "grievance," that is, an incidental point, the superior Court, if it reversed the sentence of the Court below, retained the principal cause.

The following is a summary of the Articles:[1]—

Art. I.—Recites the fact that any one publishing doctrines repugnant to the Liturgy and the Articles of 1562, is to be punished canonically.

Art. II.—Gives the names of Mr. Whiston's works:—"Wherein," it says, "you have declared that the Arian doctrine concerning the Trinity and Incarnation is the doctrine of our Blessed Saviour, His Apostles, and the first Christians, and do very scandalously insinuate that all who have considered these matters want nothing but the honesty and courage to own themselves of the same opinion," and quotes the following passages as bearing out these assertions:—

(1). And now it was, and indeed not till now, that I had all my evidence at once before me, and that I was able to affirm and assuredly pronounce, that the Arian doctrine was in these points, viz. the Trinity and Incarnation, most certainly the original doctrine of Christ Himself, of His Holy Apostles, and of the most primitive Christians. (Hist. Pref. pp. 6 and 7.)

(2). Where the Scriptures speak of the One God, they mean thereby One Supreme God the Father only. (Hist. Pref. p. 81.)

The moderns called these Three Divine Persons, but One God, and so introduced at least a new and unscriptural and inaccurate, if not false, way of speaking into the Church (Errata, p. 123). To whom, with the Father and Holy Ghost, read, In the Holy Ghost, and *dele* Three Persons and One God, &c. (Hist. Pref. p. 82.)

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[1] The Articles were published in 1715, after the trial had ceased, in "Several Papers relating to Mr. Whiston's Cause before the Court of Delegates; viz. I. Mr. Whiston's Reasons against that Procedure. II. The Articles exhibited against him by Dr. Pelling before that Court. III. Mr. Whiston's defence of himself from those Articles, &c." London, 1713, and dedicated to the Delegates by name. The Articles are addressed to Mr. Whiston in the names of the thirteen members of the Court of Delegates.

These I allow to be my own words, and to be agreeable to my own not uncertain opinion, but certain faith. I was once, as the world will see by the occasion of the latter erratum, in the common opinion, that the Father, Son, and Holy Ghost, the three Divine Powers (Persons), were truly in some sense One God, or the One God of the Christian religion: that is, before I particularly examined that matter in the Scriptures, and the most primitive writers; but since I have thoroughly inquired into it, I am so fully satisfied that the Father alone is the One God of the Christian religion, that I must now own that, when once I deny or doubt that doctrine, I must deny or doubt of our common Christianity; there being no one article more plain or more universally acknowledged in all the first ages of the Church than that was. (Hist. Pref. p. 81.)

(3). That the Son is inferior as well as subordinate to the Father. (Hist. Pref. p. 65.)

(4). That the Son was begotten or created by the Father only before the world, whatever secret eternity He had before His generation or creation (Hist. Pref. p. 65.)

(5). Jesus Christ the Word and Son of God, is a Divine Being (or Person), far inferior to His Father in nature, attributes, and perfections. (Reply to Allix, p. 30.)

(6). That the Holy Spirit is inferior as well as subordinate to the Father and the Son. (Hist. Pref. p. 65.)

(7). The Holy Ghost of God is a Divine Person, made under the Supreme God by our Saviour, or, in a due sense, proceeding from the Father and the Son, of different perfections and offices from the Son of God. (Reply to Allix, p. 33.)

(8). Since your Lordship is so thoroughly sensible of the Anti-Christianism of Popery, I would fain know how the consubstantiality and co-equality of the Holy Ghost to the Father and the Son, on which soon followed His invocation, which only stands upon one letter of Pope Liberius or Damasus, can by your Lordship be looked upon under any other denomination. (Hist. Pref. p. 28.)

(9). This language (to the Father, Son, and Holy Ghost, One God, whom we adore) is so entirely contrary to the nature of the Christian religion, that I cannot go into it for any consideration whatsoever. (Appendix to Hist. Pref. pp. 5 and 6.)

(10). I allow that the Blessed Spirit is to be worshipped in these forms, viz. Baptism, Doxology, and Blessing, but never by invocation. (Hist. Pref. p. 46.)

(11). I cannot but look on this discovery, viz. that the Λόγος in Christ supplied the place of the Πνεῦμα, or rational soul in man, as one of the most certain and most important of all others. (Hist. Pref. p. 6.)

(12). Jesus Christ the Word and Son of God, when He was incarnate, was liable to temptations in His divine nature, and therein suffered for us, as the rational soul is tempted and suffers in other men, by its partaking of the temptations and sufferings of the body. (Reply to Allix, p. 32.)

Art. III.—Objects that the above-cited passages contain assertions false and heretical, highly derogating from the glory of our Saviour and the Holy Spirit, repugnant to the Holy Scriptures, and contrariant to the decrees of the two first General Councils and to the Liturgy and Articles of the Church of England.

Art. IV.—Objects that Mr. Whiston, to support his heretical opinions, has

published the following words:—"I have, I think, certainly found that these Apostolical Constitutions, which the Anti-Christian Church has so long laid aside as spurious or heretical, are no other than the original laws and doctrines of the Gospel—the new covenant—or most sound standard of Christianity, equal in their authority to the four Gospels themselves, and superior in authority to the Epistles of single Apostles; some parts of them being our Saviour's own original laws, delivered to the Apostles, and the other part the public acts of the Apostles themselves, met in Council at Jerusalem and Cesarea before their deaths, and this was the constant opinion and testimony of the earliest ages of the Gospel." (Hist. Pref. p. 85.) Which assertion so advanced concerning a book which was never yet acknowledged as part of the Canon of Scripture by any General Council, nor received as such in any Christian church, ought to be esteemed and reputed as absurd and impious, tending to create in the minds of Christians great uncertainties as to their rule of faith, and to subvert that faith which was once delivered to the Saints, and is preserved in the sacred books of the New Testament received in the Church of England.

Art. V.—Recites the subscription made by Mr. Whiston, when ordained priest, to the three articles of the 36th Canon.

Art. VI.—Charges Mr. Whiston with being the real author of the "Historical Preface," and of the "Reply to Dr. Allix."

Art. VII.—Asserts that for the writing and asserting as above cited, Mr. Whiston ought to be punished according to the Ecclesiastical Laws of the Realm and Canons and Constitutions of the Church of England.

Art. VIII.—Asserts Mr. Whiston, as an inhabitant of Great Britain, to be subject to the Jurisdiction of the Court.

Art. IX.—(In Latin) charges the foregoing statements as notorious, and declares that Mr. Whiston should be compelled to retract, and also that he should be punished according to the exigency of law.

Mr. Whiston pleaded his own cause upon the Theological point in question, in a written defence, which he published on the day following its delivery. But he had other advocates who entered into the legal bearings of the case. From the accounts given by Whiston in his Memoirs, it would appear that the Judges were in some way dissatisfied with the proceedings. "Mr. Justice Tracy," he says, "being uneasy at the Court, whispered my advocate, Sir Peter King, to move for a prohibition." And their scruples seem to have been shared by Hooper, Bishop of Bath and Wells, who, after several meetings of the Court, proposed that it should adjourn *sine die*. This was in the summer of 1714. The Lord Chief Justice Dod "being teazed," says Whiston, "by the Bishop of Winton (Trelawny) to appoint fresh days for the meeting of the Court, replied that he would be no judge of heresy." Other members of the Court, however, were anxious to proceed, and one of the Counsel, Dr. Paul, told Whiston, that he had learned that the design was to hasten on the prosecution to a determination or

sentence so soon after the Christmas holidays of 1714 as, if possible, to get all the proceedings terminated before the Courts should be open at Westminster Hall, in order that he might be debarred from moving for a prohibition; and that with this object they had sent for the Bishop of Bath and Wells; but he had replied that he could not come up at that time. The whole matter was terminated by the accession of King George, which was signalized by an act of amnesty, whereby all offences, including heresy, were pardoned.

LUCY *v.* WATSON, BISHOP OF ST. DAVID'S.

1695—1705.

[THIS Case is one of peculiar importance, not merely as almost a solitary instance, since the High Commission Court was abolished, of the deprivation of a Bishop by any judicial Sentence, but rather as being the only case in which the grave questions of jurisdiction, involved in such a proceeding, have been discussed in a Court of Law, and in which the arguments of Counsel and the opinions pronounced by the Judges have been handed down in the legal reports of the time. It is also remarkable as exemplifying the procedure of a Court, the functions of which have very rarely been called into exercise during the last two hundred years; and, lastly, for the length of time during which, in one form or another, it was under adjudication, and for the numerous efforts made by the Bishop of St. David's to set aside the Sentence pronounced against him.[1]

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[1] Principal proceedings in the case of *Lucy* v. *Bishop of St. David's*, with their dates :—

August 23, 1695 . . .	Institution of Suit in the Archbishop's Court.
October 24	Bishop Watson appears under protest.
March 20, 1696 . . .	Waives his Privilege in the House of Lords.
April 2	Articles brought in by Lucy.
February 20, 1699 . .	Bishop Watson protests against the Archbishop's jurisdiction, and appeals to the Delegates *a gravamine*.
March 13	Commission of Appeal issued.
Easter Term, 1699 . .	Bishop Watson moves in King's Bench for a Prohibition, which is refused.
June 8	The Delegates pronounce against the Bishop's Appeal, and remit the Cause.
August 3	The Archbishop pronounces Sentence of deprivation. The Bishop appeals to the Delegates from the Sentence.
August 19	Second Commission of Appeal issued.
Nov. and Dec. 1699 . .	Bishop Watson claims to resume his parliamentary Privilege, which the House, after hearing Counsel, disallows.
Hilary Term, 1700 . .	Bishop Watson moves again, in the King's Bench, for a prohibition and *mandamus*, which are refused.
February 22	The Delegates confirm the Archbishop's Sentence, and remit the Cause.

There seems to be no complete account of the whole Case, but it is partly reported in *Lord Raymond's Reports*, vol. i. pp. 447, 539; vol. ii. pp. 790. 817; *Salkeld's Reports*, vol. i. p. 134; *Carthew's Reports*, p. 484; *Modern Reports*, vol. v. p. 433 (as the "*Bishop of Chester's Case*"), vol. vii. p. 237. There is also an account of the Case in *Howell's State Trials*, vol. xiv. p. 447, where several interesting extracts, from a variety of sources, have been brought together. Much of the following Report has been compiled from the MS. Records in the Registry of Ecclesiastical Appeals, Doctors' Commons.]

SUMMARY OF THE POINTS OF LAW DECIDED IN THIS CASE.

The points of law laid down in this Case are to be found exclusively in the *dicta* of the Judges of the Court of King's Bench, on the two motions for a Prohibition. The more important points may be summed up as follows:—

The Archbishops by the Common Law have provincial or metropolitical jurisdiction over their Suffragan Bishops.

The Archbishop may cite a Suffragan Bishop to appear before him or his Vicar-general.

He may sit as Judge, with or without Assessors, and may hold his Court in what place in his Province he will.

He may, with the Assistance of Assessors (or, apparently, without them), suspend or deprive a Suffragan Bishop for any offence, the penalty for which, by the ecclesiastical law, is suspension or deprivation.

The Peerage and Temporalities of a Bishop are but accessory to his office, and the fact that they are lost by deprivation does not exempt him from being deprived by the Archbishop.

An unlimited visitatorial power implies the power of deprivation.

An offence committed by a Bishop in some other capacity (*e.g.* as Rector *in commendam* of a parish in another Bishop's Diocese) is punishable in the Archbishop's Court as a breach of the duty of the Bishop's office.

An offence punishable at Common Law, is also, when committed by a Bishop, a breach of the duty of his office, and as such is punishable in the Archbishop's Court, but only with Ecclesiastical censures, not as a temporal offence.

An act which is an offence by the Canon Law, but not by the Common

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February and March . .	Bishop Watson applies to the Lord Chancellor for Writ of Error, on the denial of the Prohibition in King's Bench, which is brought before the House of Lords, but not received.
	Subsequently he is excommunicated and arrested for non-payment of costs.
Michaelmas Term, 1702.	He is brought up before the Queen's Bench, when the Writ de excom. capiendo is quashed.
	Information of intrusion exhibited against him in the Court of Exchequer. Judgment given against him.
	He appeals to the Exchequer Chamber, where the Judgment is confirmed.
1704–5	He brings the suit by Writ of Error before the House of Lords, where at last, on his failure to proceed, it is dismissed.

Law, will, if committed by an Ecclesiastical person, be punishable in the Ecclesiastical Court.

Simony is an offence independently of the Canon Law by the Statute 31 Eliz. c. 6.

The Clergy are subject to Canons made by Convocation with the consent of the King, and might be deprived for not conforming thereto.

The Canons of 1603 are binding on the Clergy.

If an Ecclesiastical Court, in the exercise of a jurisdiction recognised by the Common Law, violates the Canon Law, that is a ground for Appeal to the Appellate Court, but not for a Prohibition from the Court of Queen's Bench.

Similarly, the Court of Queen's Bench will not grant a *mandamus* to compel an Ecclesiastical Court to proceed according to its own laws.

It was also affirmed that—

Convocation has no power to deprive a Bishop.

A Bishop might be deprived by the Archbishop for dilapidations.

Note.—The question of a Bishop's parliamentary Privilege was not decided by the House of Lords, but the Court of Queen's Bench seems to have held that a Bishop was not, as a Peer or Lord of Parliament, exempt from the Archbishop's metropolitical jurisdiction.

Dr. Watson had been appointed Bishop of St. David's by King James II. in 1687, and though not a non-juror, he seems to have been a warm partisan of that king. His trial evidently excited strong party feeling.

According to the statement of Lucy, the promoter or prosecutor, Bishop Watson had, before the commencement of the Suit, been inhibited by Archbishop Tillotson, on a Metropolitical Visitation by that Primate, from exercising his episcopal jurisdiction, and having ordained and collated in spite of this Inhibition, he was suspended by the same Archbishop in 1694. But Tenison, who succeeded to the Primacy at the end of that year, is said to have withdrawn the Suspension, at Bishop Watson's request, on the institution of the Suit by Lucy.

Lucy, who "promoted the office of Judge" in this case, was son of Dr. Lucy, a former Bishop of St. David's, to whom he had been Secretary and Registrar of the Diocese, and he seems to have held the latter office when the proceedings against Bishop Watson were set on foot.

The Suit was commenced as usual, by the issue of a Citation to the Bishop of St. David's, which, after setting forth the nature of the charges against him, summoned him to appear before the Archbishop or his Vicar-General, in the Hall of Lambeth Palace. The Bishop appeared on the appointed day, but under protest, and without prejudice to his Parliamentary Privilege, "declaring that he was advised by great Lords to take care that he did nothing to

the prejudice of the Privilege of their House." Subsequently, however, the matter was brought before the House of Lords, on a Petition from Lucy, praying that the Bishop might not insist upon his Privilege; and the House, after some discussion, dismissed the Petition, on the understanding that the Bishop would waive his Privilege; which he did accordingly.

Lucy then brought in twenty-nine Articles, to which two more were afterwards added, setting forth the charges in detail. The main charges were briefly as follows:—

"That he had simoniacally collated his nephew, John Medley, (1) to the Archdeaconry of St. David's, on his agreeing to sign a bond binding him to pay the Bishop 100*l.*; (2) To the Prebend of Cliddy, in the Cathedral Church; and (3) To the office of Treasurer of the Collegiate Church of Brecon. And that he had retained to himself all the profits of the said Archdeaconry, Prebend, and Treasurership.

"That being Rector *in commendam* of Burrough Green, in the county of Cambridge, he had agreed with one William Brooks, his Curate, for the sum of 200 guineas, to resign to him the Rectory when requested to do so.

"That he had taken excessive Fees at Ordinations, Institutions, and Visitations, &c.

"That he had ordained certain persons without administering to them the Oaths of Allegiance and Supremacy, as required by law, and had afterwards certified that they had taken the Oaths.

"That he had performed judicial acts without any Registrar being present, as required by the 123d Canon.

"That he had ordained Deacon, and in the following month Priest, one Thomas Morgan, 'a young lad newly gone from the Free School at Brecon, not exceeding the age of nineteen years.'

"That he had converted to his own use certain endowments appropriated by a Charter of King Henry VIII. for the maintenance of a schoolmaster of Christ's College, Brecon, and had detained the Charter and other documents relating thereto.

"That he had not admonished a clergyman who, when officiating in his presence, had neglected to read the prayer for the preservation of King William."

In answer to these Articles, Allegations were put in by the Bishop, denying the charges of Simony, extortion, and of omission to tender the oaths required by law, and stating, in effect, that he had retained the profits of his nephew's preferments, because his nephew was

indebted to him; that he had never resigned the Rectory of Burrough Green; that he had taken only the customary fees; that before ordaining Morgan, he had required a certificate,[1] which he produced, from the Curate and Churchwardens of the parish in which Morgan had been baptized; and that the alleged endowments of Brecon College really belonged to the Bishopric of St. David's, and were not mentioned in the Charter. He also asserted that it was a malicious prosecution, the promoter Lucy, and others who aided him, having long been the Bishop's personal enemies. Other pleadings followed, and a great number of witnesses were examined on each side by Commissions appointed to sit at Brecon, Carmarthen, and Oxford; the evidence in support of each pleading, according to the old practice of the Ecclesiastical Courts, being taken as soon as might be after the pleading was brought in, but not published until all the pleadings were concluded.

In the meantime, the necessary proceedings in Court were had either before the Archbishop in person, with the Vicar-General for Assessor, or before the Vicar-General alone; on a very few occasions there were also present as Assessors one or two Bishops, who were not, however, of the number of those who assisted the Archbishop when the case came on for hearing.[2]

At length, after repeated delays, mainly, it would seem, occasioned by the Bishop of St. David's, the Bishop, on the 20th February, 1699, at a Court held by the Archbishop and the Vicar-General, put in a Protest against the Archbishop's jurisdiction, on the ground that many of the charges alleged were matters for the cognisance of the temporal Courts; but this Protest being overruled, and some

[1] This Lucy afterwards alleged to be a forgery, but no notice is taken in the Archbishop's sentence, either of the original charge or of the alleged forgery.

[2] The Court thus constituted, though not so termed in the proceedings, seems, in fact, to have been the Archbishop's Court of Audience; for Oughton, who very soon afterwards became Deputy Registrar of the Delegates, speaks of the Court of Audience as having become obsolete long before his time, but adds, with evident reference to this Case, "Nisi quatenus Ipse (nonnunquam) Archiepiscopus in arduis (utputa deponendis Episcopis aut similibus,) Audientiam suam celebrat, in propriâ personâ et proprio palatio, cum Auditore speciali, sive Auditoribus ad hoc specialiter constitutis pro istâ vice unà secum assidentibus." [Oughton's Ordo Judiciorum, Prolegomena, p. xvi. (1738.)] During these preliminary proceedings, the Court was held in a great variety of places, *e. g.*—The Hall of Lambeth Palace, the Archbishop's Chamber at Whitehall, a Room in the Archbishop's House at Westminster, called "Le Cockpitt," and the Hall of the College of Advocates at Doctors' Commons.

of his Allegations having been rejected at the same sitting, the Bishop, by his proctor, appealed against their rejection.

The Appeal lay to the King in Chancery, *i.e.* to the High Court of Delegates, and on the 13th of the following month a Commission issued out of Chancery, in which five Peers, five Bishops, five Common Law Judges, and five Civilians were named as Delegates[1] to hear the Appeal, with a proviso that two Commissioners at least should be present at all the ordinary acts of the Court, and not less than seven when Sentence should be pronounced, of whom one must be a Peer, one a Bishop, and one a Common Law Judge.

But while the Appeal was pending before the Delegates, Bishop Watson (seeing, perhaps, that their decision was likely to be against him) moved in the Court of King's Bench for a Prohibition. Sir Bartholomew Shower, his Counsel, supported the motion on several distinct grounds.

I. That Bishop Watson had been cited to appear before the Archbishop and his Vicar-General in the Hall of Lambeth Palace, which was not a Court of which the Law could take notice; for, admitting the Archbishop to have the same power over his Suffragan Bishops as a Bishop over his clergy, no Bishop could cite the clergy before him except in Court; and that the Citation ought to have been to the Court of Arches.

In reply, Serjeant Wright, for the Archbishop, cited two cases; (1) Of Dr. Wood, Bishop of Lichfield and Coventry, who had been suspended in 1687 by Archbishop Sancroft for dilapidations, and his See sequestered; (2) Of Marmaduke Middleton, Bishop of St. David's, suspended in 1582, by the High Commissioners, for abuse of the Charity of Brecknock (one of the charges against Bishop Watson); and, as to the latter Case, he contended that the High Commissioners "had no new jurisdiction, or greater, than the Archbishop."

The whole Court held that the Citation was good, and Holt, C. J. is reported to have said—

[1] The Delegates were :—The Earls of Bridgewater, Stamford, *Manchester*, *Marlborough, Tankerville; the Bishops of *Bangor, Ely, *Oxford*, *Norwich, and **Peterborough*; Sir G. Treby, C. J. of King's Bench; *Sir E. Ward, C.B. of Exchequer; Sir J. Powell, Justice of King's Bench; Sir L. Powys and Sir H. Hatsell, Barons of the Exchequer; Sir C. Hedges, Judge of the Admiralty Court, and Doctors *Edisbury, King, Bridges and Wynne.

All except the six Commissioners whose names are marked with an asterisk were present when Sentence was pronounced on the Appeal. All except the three whose names are in italics, were members of the Commission on the subsequent Appeal.

"The admitting of the point of jurisdiction to be disputed, would be to admit the disputing of fundamentals, which the counsel of the other side attempt to subvert, not duly considering the respect due to the Primate and Metropolitan of England; for the Archbishop of Canterbury has, without doubt, provincial jurisdiction over all his Suffragan Bishops, which he may exercise in what place of the province it shall please him; and it is not material to be in the Arches, no more than any other place; for the Arches is only a Peculiar, consisting of twelve parishes in London, exempt from the Bishop of London, where the Archbishop of Canterbury exercises his metropolitical jurisdiction, but he is not confined to exercise it there. And the Citation is here to appear before the Archbishop himself or his Vicar-General, who is an officer of whom the law takes notice."[1]

II. As to the alleged simoniacal contract made by the Bishop for the resignation of his Rectory of Burrough Green, in the Diocese of Ely, it was argued:

That he had made the contract, not as Bishop of St. David's, but as Incumbent of Burrough Green, and therefore the Suit should have been commenced in the Court of the Bishop of Ely, not brought *per saltum* before the Archbishop.

But the whole Court held—

That "if a Bishop makes a simoniacal contract, it is a personal offence in him, and contrary to his office of Bishop, and is punishable by the Metropolitan by the ecclesiastical censures" (*i.e.* by Suspension, Deprivation, &c.).

A further objection that the contract was not Simony within the statute 31 Eliz. c. 6 was also overruled, on the ground that Simony was an offence by the ecclesiastical law independently of the statute, and as such was punishable in the Spiritual Court.

It was further laid down by Holt, C. J.—

That the Clergy are subject to Canons made by Convocation (with consent of the King), and if they do not conform thereto, may be deprived.

Also, that the Canons of 1603, if not those of 1640, are binding upon the Clergy.

III. Another objection taken by the Bishop's Counsel was, that many of the offences charged were cognisable in the temporal Courts, and could not therefore be tried by the Archbishop, viz.:

That the taking excessive Fees was punishable as Extortion; the

[1] See Lord Raymond's Reports, vol. i p. 447.

ordaining without administering the oaths required by law, as a breach of the Statute 1 William & Mary; and the ordaining under age as a breach of the Act of Uniformity.

But the whole Court held—

That taking excessive Fees was, by the Canon Law, Simony, and therefore cognisable in a Spiritual Court.

And further—

That any of these offences, if committed by a Bishop, were offences against his office, and "as to that which relates to the office of Bishop, and is against his duty as a Bishop, the Spiritual Court may proceed against him, to deprive him, but not punish him as for a temporal offence."

The result was, that a Prohibition was granted *quoad* the charges for abuse of the Charity at Brecknock, but denied as to the rest.

The Bishop having failed to obtain a Prohibition, except on a single point, the Appeal to the Delegates proceeded; and on the 8th June, 1699, the Court pronounced against the Appeal, remitted the Cause to the Court below, and condemned the Bishop in the costs.

The Suit was then resumed in the Archbishop's Court, and shortly afterwards came on for hearing before him and five[1] Bishops, whom he called in as his Assessors; viz.:

Henry (Compton)	Bishop of London;
Thomas (Spratt)	Bishop of Rochester;
William (Lloyd)	Bishop of Worcester;
Gilbert (Burnet)	Bishop of Salisbury;
John (Hough)	Bishop of Oxford, (and Bishop elect of Lichfield and Coventry).

The Court, thus composed, sat very frequently, sometimes three times in the same day, commencing at seven A.M. On each occasion the Archbishop was assisted by several of the Assessors, as well as by the Vicar-General. He pronounced Sentence on the 3d August, when all the Bishops were present, except Spratt, who, according to Burnet, consented to a Suspension, but did not think that a Bishop could be deprived by an Archbishop.

The Sentence, which is very long, and in Latin, is signed by the Archbishop only, and runs throughout in his name, the four

[1] Burnet says there were six Bishops called in, of whom he was one; but only five are mentioned in the records of their proceedings. Possibly, the second designation of the Bishop of Oxford may have caused the error.

Bishops who were present being only mentioned as Assessors. It declared—

(1.) That Thomas Watson, Bishop of St. David's, had simoniacally presented his nephew, John Medley, to the Prebend of Cliddy, the Archdeaconry of St. David's, and the dignity of Treasurer of Christ's College, Brecon.

(2.) That he had contracted to resign the Rectory of Burrough Green, in the county of Cambridge, to William Brooks, for the sum of 220*l.*

And that, by reason of both these acts, he had committed the detestable crime of Simony.

(3.) That he had exacted excessive Fees, to the grave scandal of the Church and his Episcopal office.

(4.) That he had ordained many clergymen without administering the oaths required by law, yet had certified that the oaths had been taken; and had thus committed the *Crimen falsi.*

(5.) That he had granted collations, institutions, sequestrations, &c. and done other acts of ecclesiastical jurisdiction, without any Registrar, Notary, or other lawful person being present, thereby giving occasion to secret fraud and controversies.

Then, after stating that these and very many (*quam plurima*) other enormous crimes and excesses against the sacred Canons, and the laws received and established in the English Church, had been proved, it proceeded as follows:—

"Idcirco Nos Thomas Archiepiscopus et Judex antedictus præfatum Thomam Watson, Sacræ Theologiæ Professorem, ab omni honore dignitate et loco suo Episcopi Ecclesiæ Cathedralis Menevensis, cum suis juribus et pertinentiis universis, et ab omni officio et administratione Episcopali et ab beneficio ecclesiastico deprivandum amovendum et deponendum fore de jure debere pronunciamus decernimus adjudicamus et per præsentes declaramus, et præfatum Thomam Watson, ab iisdem honore dignitate et loco suo Episcopi Ecclesiæ Menevensis prædicti et ab omni officio et administratione Episcopali et ab omni beneficio Ecclesiastico (justitiâ id poscente) deprivamus amovemus et deponimus per præsentes."

The Sentence also interdicted him from wearing the dress or using the insignia of a Bishop of the realm of England, under pain of the greater Excommunication.

Lastly, it condemned him in the costs of the Suit.

From this Sentence Dr. Watson again appealed; and on the 19th August, 1699, a second Commission of Appeal was issued to

twenty-one Delegates, all of whom, except one Peer and three of the Bishops, had been members of the former Commission of Appeal.

When the Delegates met, it was contended, on the part of Lucy, that no Appeal lay from the Sentence of deprivation. The Delegates, however, held that there was an Appeal, and the Case proceeded.

Subsequently, they decreed that Dr. Watson should be suspended *pendente lite.*

In the meantime, the Bishop had claimed to resume his Parliamentary Privilege, which he had waived soon after the commencement of the Suit; and the House of Lords ordered (on the 29th November, 1699), that he, and the Archbishop also, if he should see fit, should be heard by Counsel at the bar of the House. Counsel were heard accordingly on behalf of both parties, and were followed, on a subsequent day, by the Attorney-General, who had requested to be heard on behalf of the Crown, "apprehending that something might arise tending to the diminution of the King's Prerogative in ecclesiastical affairs."

The chief ground on which it was sought to establish the Bishop's claim to resume his Privilege, was the alleged illegality of the Archbishop's Sentence; and this question seems to have been very fully argued, although eventually the House came to no express decision upon it.[1]

For the Bishop of St. David's it was contended that the jurisdiction in cases of deprivation lay not with the Archbishop, but with Convocation.

That the Archbishop could not claim it by statute, for there was none; nor by usage, for the only methods of deprivation ever practised in England were a Synod, a Commission, and an Act of Parliament; nor by his legatine authority; for, whatever that might be, it was now annexed to the Crown; nor in virtue of his right of visitation, for that did not necessarily imply the right to deprive a Bishop, whom he might admonish, but admonish only; nor, again, from the reason of the thing—for Bishops, like Archbishops, were Peers, and their rights as Peers should not be subjected to the judgment of one single man. Moreover, the Church might be ruined, and the State endangered, by the exercise of such an arbitrary power, if it should fall into unworthy hands.

[1] The following statement of the arguments is abridged from an Article printed (from the Harleian MSS.) in "Howell's State Trials," vol. xiv. p. 454.

That, according to the doctrine of the four first Councils, deprivation was by a Metropolitan and Bishops, not by the Metropolitan alone, in which case there would have been no possibility of punishing Archbishops; nor had even the Pope been able to acquire such a power before the Council of Trent; and in England, on the abolition of the Court of High Commission, synodical deprivation had, in fact, been restored.

It was also asserted, that, in waiving his Privilege, the Bishop had supposed that the Archbishop had only power to admonish him, so that his previous submission must not be interpreted as admitting the Archbishop's right to suspend or deprive; and his Privilege having been waived in error, might now be resumed.

Lastly, an objection was taken that the Delegates appointed to hear the Case on the merits were, for the most part, the same as those who had denied the Bishop justice on the former Appeal.

The Archbishop's Counsel replied:—

That after so long a submission, it was now too late to dispute the Archbishop's jurisdiction, or to resume the Privilege which the Bishop had voluntarily waived. Besides, he had himself moved for the Commission; and to resume his Privilege would be to contradict his own act.

That the Archbishop's power of visitation implied the right to inquire, correct, and punish; and, in case of Simony, by deprivation. That the instances of deprivation by a Synod did not disprove the Archbishop's right. That the canonical obedience enjoined on Bishops was inconsistent with their alleged equality to the Archbishop; and that the power of citing Bishops before him was preserved to the Archbishop by the Statute of Citations (23rd Hen. VIII. c. 9).

For the Crown, the Attorney-General is reported to have said:—

That the King's supremacy consisted in the power (1) of making Canons; (2) of punishing ecclesiastical persons for the breach of those Canons. That since the abrogation of the Court of High Commission, the King could take cognizance of ecclesiastical Causes only on appeal from the Archbishop, and that, consequently, to deny the jurisdiction of the Archbishop in any ecclesiastical Cause whatever, was to cut off his Majesty's cognizance, and so to infringe the royal Prerogative. That if the right of judging a Bishop had lain with Convocation, an Appeal therefrom to the King would have been specified; and, lastly, that the objections to a trial by Convocation, as being at once the original and ultimate

judges, would be far greater than the objections to the Archbishop's jurisdiction, from which there was an Appeal, as of right, to the Crown; and, again, a further Review if the Crown should see fit to grant it.

After hearing these arguments, and the opinions of the Judges, as to the methods by which, as the law then stood, a Bishop guilty of any ecclesiastical offence for which deprivation was the punishment, might be deprived, the House came to no decision on the disputed question of jurisdiction; but, after debate, the Question was put, "Whether the Bishop of St. David's should be allowed his Privilege?" and it was resolved in the negative.[1]

Having failed again in the House of Lords, and seeing (it is said) that the Delegates, who had already rejected some Allegations tendered by him, "were of opinion to affirm the Archbishop's Sentence;" the Bishop next moved a second time in the Court of King's Bench for a Prohibition, alleging that, by the Canon Law the Archbishop *alone*[2] could not deprive a Bishop. The arguments on this motion were very similar to those which had been advanced in the House of Lords.

On the part of the Bishop of St. David's:—

That Bishops, as Lords of Parliament, are Peers to the Archbishop, and, therefore, he could have no authority over them.

That all deprivations of Bishops up to that time had been by the Ecclesiastical[3] Commission, or in Convocation, or by Act of Parliament.

That, although the Archbishop might visit and censure, it did not follow that he could also deprive.

That the Archbishop had no control over the temporal state of the Bishops, and could not therefore deprive them, and thereby take away their temporalities.

Lastly, that the Commissioners who had tried the Appeal *a gravamine*, ought not to be Judges on the Final Appeal.

On the other side, the Attorney-General cited in support of the Archbishop's jurisdiction the exception in the Act 23d Henry VIII.

[1] Burnet says that this Resolution was carried "by no great majority," and that "it ended in an intimation that it was hoped the King would not fill the See till the House should be better satisfied on the point of the Archbishop's authority; so the Bishopric was not disposed of for some years." It remained vacant till 1705, when Dr. Bull was appointed.

[2] Though four Assessors had been present and consenting, the Sentence of deprivation was that of the Archbishop alone.

[3] *I. e.* the Court of High Commission.

c. 9, which forbids any person to be cited out of the diocese in which he dwells, except in case of a spiritual offence committed by the Bishop or other person having spiritual jurisdiction. He also referred to the clauses saving the jurisdiction of Archbishops in the Act, 13[1] Car. II. c. 12, and 29[1] Car. II. c. 9.[2]

The matter was moved several times at the bar, and the whole Court was of opinion that the Prohibition should not be granted.

Holt, C.J., in delivering judgment, is reported to have laid down :[3]—

That Archbishops and Bishops, though *pares jure divino*, are not so *jure humano*.

That "there are Archbishops who have authority over their Suffragan Bishops, and Primates who are superior to them."

That the Archbishops in England had anciently "the same jurisdiction of supremacy as the Patriarchs of Constantinople;" which, having been usurped by the Pope, was long disused, but was restored by the Act of Hen. VIII. (25 Hen. VIII. c. 20.)

That "it was always admitted that the Archbishop had metropolitical jurisdiction, and the Bishops swear canonical obedience to him."

That "where there is an unlimited visitatorial power, there must be of consequence a power of deprivation;" and that "the same superiority which gives him power to pass ecclesiastical censures upon the Bishops, will give him power to deprive, it being only a different degree of punishment for a different degree of offence." Thus the Statutes 26 Hen. VIII. c. 1, and 1 Eliz. c. 1, where "there is not one word of deprivation," "but only to visit, &c." had been construed to give a power to deprive.

That "no other jurisdiction can be shown to which they (the Bishops) are subject; for all the same objections may be made to the power of Convocation; the notion of deprivation by which was," the Chief Justice said, "a new fancy of Sir Bartholomew Shower's."

That the Peerage and temporalities of Bishops were but accessory to their office, as formerly with the mitred Abbots, who were Lords of Parliament and yet might be deprived by their visitors.

[1] The former of these two Acts limited and explained the Act 16 Car. I. c. 11, by which the High Commission Court was abolished; the latter did away with the writ *de hæretico comburendo*.

[2] The other arguments against the motion are comprised in the *dicta* of Holt, C.J., quoted below.

[3] See Lord Raymond's and Salkeld's Reports.

It was added by Gould, J.—

That Bishops might be deprived for dilapidations, and, as it seemed, by the Archbishop.

Also, as to the Cases of deprivation by the High Commission, that "when there was such a summary way of proceeding, it is no wonder if such a tedious proceeding before the Archbishop was not used."

But it was not on these grounds that the Court, though, as C. J. Holt said, "fully satisfied that the Archbishop had jurisdiction," based its refusal to grant a Prohibition, but rather on the fact that the motion was founded on an alleged rule of the *Canon* Law; viz. that the Archbishop *alone* could not deprive a Bishop. As to this, the Chief Justice stated, that "the Archbishop by the Common Law hath metropolitical jurisdiction, and for that purpose he was constituted," and where he did not exceed the authority which the Common Law allowed him, the breach of an ecclesiastical Canon restraining him in the exercise of that jurisdiction would be matter for Appeal to the Delegates, but not for a Prohibition.

He added, that it was "without precedent to grant a Prohibition to the Ecclesiastical Court, because they proceed contrary to the Canons."

The objection to the appointment of the same Commissioners as Delegates on both Appeals was also overruled, and it was held to be sufficient that a fresh Commission should be issued.

The prohibition being refused, the Bishop's Counsel applied for a *mandamus* to require the Delegates to admit the rejected Allegations. But this also was refused, on the ground that the Court of King's Bench could not compel the Delegates to proceed according to their own law.

From a Note appended to Lord Raymond's Report, it appears that the Bishop afterwards applied to Lord Chancellor Somers for a Writ of Error on the denial of the Prohibition, and Lord Somers being in doubt, referred the matter to the Attorney-General, who gave his opinion that the Writ of Error would lie. Accordingly, the Writ was granted, and the whole Record brought by Chief Justice Holt into the House of Lords. But the Lords, after hearing Counsel and the opinion of the Chief Justice, resolved that the Writ should not be received into the House. Lord Raymond adds —"Note, that Holt, Chief Justice, told me that if the Lords had been of opinion that the Prohibition ought to have been granted, he never would have granted it."

In the meantime, the Appeal to the Delegates went on. The Sittings, which were very frequent, were attended at first by the Bishops and Civilians only, and were held in the Hall of the College of Advocates, at Doctors' Commons; but towards the close of the Case, the Peers and Common Law Judges also took part in the proceedings, and the Court then invariably sat in the Hall of Serjeants' Inn, Fleet Street. Their decision was given on the 22d February, 1700, when all the Commissioners were present, except one Peer, one Bishop, and one of the Civilians. They confirmed the Sentence of deprivation pronounced by the Archbishop, remitted the Cause to the Court below, and condemned the Appellant, Dr. Watson, in the costs.

It seems that Dr. Watson, who had been condemned in all the costs of the Suit, failed to pay them; accordingly, he was excommunicated, and subsequently arrested on a Writ *de excommunicato capiendo*. He was confined for some time in Newgate; but, in Michaelmas Term, 1702, was brought by *Habeas corpus* before the Court of Queen's Bench. Here he pleaded, that, being a Bishop and a Peer, no *capias* would lie against him; but the Court was of opinion that, as a Bishop might be excommunicated, the Writ must lie, otherwise there would be a judgment without the power of executing it. Ultimately, however, while refusing to take notice of his plea, the Court quashed the Writ for informality, on the ground that it did not show in what Suit the costs had been incurred.

The proceedings in this prolonged Case did not terminate with the Sentence of the Delegates, nor even with the refusal of the House of Lords to receive the Writ of Error on the judgment of the Court of King's Bench. It would seem that Dr. Watson, notwithstanding his deprivation, endeavoured to retain his Episcopal Palace, at Abergwilly, in Carmarthenshire; and, in order to dispossess him, an Information of Intrusion was exhibited against him, in the Queen's name, in the Court of Exchequer. Burnet states that the Court held that he had no right to the temporalities of the Bishopric, and that, on appeal to the Exchequer Chamber, the judgment against him was confirmed. Finally, from the Exchequer Chamber, he brought a Writ of Error into the House of Lords; but, having failed to proceed within the time allowed by the Standing Orders, the Writ was, at last, dismissed "for laches of the plaintiff in error."

From Abergwilly he seems to have retired to Great Wilbraham,

in Cambridgeshire, and there lived on his private fortune, until his death, at the age of eighty, in 1717. He is said to have been buried very privately, without the funeral service, being still, it seems, under sentence of excommunication for his refusal to pay the costs; not, however, for want of means to pay them, although they were exceedingly heavy; for he was worth, it is said, 20,000*l.* when he died.

THE OFFICE OF THE JUDGE PROMOTED BY BISHOP, H.M. PROCURATOR-GENERAL, *v.* STONE.

1809.

[THE following case is frequently cited in proceedings against clergymen on charges of false doctrine. The Report of it is taken from the first Volume of Haggard's Consistorial Reports.]

This was a case of criminal proceeding against the Reverend Francis Stone, under the Statute 13th Elizabeth, c. 12, and for maintaining and affirming doctrines contrary to the Articles of Religion, as by law established.

The case was argued before Sir W. Scott in the Consistory Court of London by the King's Advocate, Dr. Lawrence, and Dr. Swabey, in support of the proceedings; and by Mr. Stone, who appeared in person to conduct his own defence.

JUDGMENT.

Sir WILLIAM SCOTT.—This is a prosecution against the Reverend Francis Stone, Rector of Cold Norton, originating in a citation, in the name of the Bishop of London, though the Bishop might be personally ignorant of the existence of such a suit. It is the constant style of the Court, and it is not in the power of the Bishop, by any intervention on his part, to refuse the process of the Court to any one who is desirous to avail himself of it, in a proper case. The suit is promoted by the Procurator-General of his Majesty; and, certainly, he is not an unfit person to superintend the management of a suit which has for its object the maintenance of the established religion of the State. It is not peculiar to this Court, but is common to other Courts, and familiar to every day's experience, that suits for public interests are in the name and under the directions of the law officers of the Crown. Mr. Stone appeared under protest, and the grounds of that protest, as set forth in

objection to the citation, have been argued by his counsel,[1] whose fidelity and ability he has himself fully acknowledged. The protest was overruled,[2] and it was open to the party to have appealed against that decision, or to have prayed a prohibition; but he has done neither. He has confined himself, in his defence, to a loose verbal protestation, of which it is impossible that any notice can be taken. The Court, therefore, is under the necessity of administering the law, according to the nature and extent of its jurisdiction, on the offence alleged and proved. This offence is laid under the Statute 13th Elizabeth, "for advisedly maintaining or affirming doctrines directly contrary or repugnant to the Articles of Religion." These Articles are not the works of a dark age (as it has been represented); they are the production of men eminent for their erudition, and attachment to the purity of true religion. They were framed by the chief luminaries of the Reformed Church, with great care, in Convocation, as containing fundamental truths, deducible, in their judgment, from Scripture; and the Legislature has adopted and established them, as the doctrines of our Church, down to the present time.

The purpose for which these Articles were designed, is stated to be "the avoiding the diversities of opinions, and the establishing of consent touching true religion." It is quite repugnant, therefore, to this intention, and to all rational interpretation, to contend, as we have heard this day, that the construction of the Articles should be left to the private persuasion of individuals, and that every one should be at liberty to preach doctrines contrary to those which the wisdom of the State, aided and instructed by the wisdom of the Church, had adopted. It is the idlest of all conceits, that

Drs. Arnold and Adams were employed in that part of the proceeding. Mr. Stone afterwards conducted his own defence in a written vindication of the opinions with which he was charged. The substance of his defence was, "that he had done no more than fulfilled his engagements with his ordaining Bishop; that he had conformed to the Church of England, as by law established, and that he had not offended against the statute; and that the prosecution was unjust and oppressive."

[2] The protest objected "that the citation was *irregular* and insufficient in calling on Mr. Stone to appear before the Judge, instead of the Bishop in person; and secondly, that the nature of the cause, and the quality of the Promoter were not sufficiently explained." The Court overruled these objections, holding "that the citation was in the usual form; that it might have issued independently of the statute;" and that the words of the statute "before the Bishop of the Diocese or the Ordinary" were to be interpreted according to the usual style and form of judicial proceedings in this Court; and on the second point, "that there was no want of due specification."

this is an obsolete Act: it is in daily use, *viridi observantia*, and as much in force as any in the whole Statute Book, and repeatedly recommended to our attention by the injunctions of almost every Sovereign who has held the sceptre of these realms. It is no business of mine, in this place, to vindicate the policy of any legislative Act, but to enforce the observance of it. I cannot omit, however, to observe, that it is essential to the nature of every Establishment, and necessary for the preservation of the interests of the Laity, as well as of the Clergy, that the preaching diversity of opinions shall not be fed out of the appointments of the Established Church; since the Church would itself otherwise be overwhelmed with the variety of opinion which must, in the great mass of human character, arise out of the infirmity of our common nature. For this purpose, it has been deemed expedient to the best interests of Christianity, that there should be an appointed Liturgy, to which the offices of public worship should conform; and, as to preaching, that it should be according to those doctrines which the State has adopted, as the rational expositions of the Christian faith. It is of the utmost importance that this system should be maintained. For what would be the state and condition of public worship, if every man was at liberty to preach, from the pulpit of the Church, whatever doctrines he may think proper to hold? Miserable would be the condition of the Laity, if any such pretensions could be maintained by the Clergy.

It is said that Scripture alone is sufficient. But though the Clergy of the Church of England have been always eminently distinguished for their learning and piety, there may yet be, in such a number of persons, weak, and imprudent, and fanciful individuals; and what would be the condition of the Church, if such persons might preach whatever doctrine they thought proper to maintain? As the law now is, every one goes to his parochial church, with a certainty of not feeling any of his solemn opinions offended. If any person dissents, a remedy is provided by the mild and wise spirit of toleration which has prevailed in modern times, and which allows that he should join himself to persons of persuasions similar to his own. But that any Clergyman should assume the liberty of inculcating his own private opinions, in direct opposition to the doctrines of the Established Church, in a place set apart for its own public worship, is not more contrary to the nature of a National Church, than to all honest and rational conduct. Nor is this restraint inconsistent with Christian liberty; for to what purpose is it

directed, but to ensure, in the Established Church, that uniformity which tends to edification; leaving individuals to go elsewhere according to the private persuasions they may entertain. It is therefore a restraint essential to the security of the Church, and it would be a gross contradiction to its fundamental purpose to say, that it is liable to the reproach of persecution, if it does not pay its ministers for maintaining doctrines contrary to its own. I think myself bound at the same time to declare, that it is not the duty nor inclination of this Court to be minute and rigid in applying proceedings of this nature; and that if any article is really a subject of dubious interpretation, it would be highly improper that this Court should fix on one meaning, and prosecute all those who hold a contrary opinion regarding its interpretation. It is a very different thing where the authority of the Articles is totally eluded; and the party deliberately declares the intention of teaching doctrines contrary to them.

With these observations on the law, I have only to inquire whether the doctrine which this gentleman has preached is contrary to the Articles? That will be a very short discussion on the evidence which has been laid before the Court.

The first Article states the doctrine of the Trinity; the second, the Divinity of our Saviour, and the Atonement by His death and sacrifice. It is alleged that Mr. Stone has, in a sermon, publicly impugned these doctrines, and that he has since committed these sentiments to the press. It is not necessary that I should state the particular terms in which these fundamental tenets have been impugned. The Court has heard those observations repeated more frequently than it wished, and more than could be agreeable, it hopes, to many of the auditors. Mr. Stone himself has admitted, and is ready to admit—more so, perhaps, than those who had the management of his defence would have advised—the total opposition of his doctrines to the Articles in question. I have listened with patient attention to what he has offered this day, but I find it little more than a repetition of his sermon. It is not necessary for me to go through the rest of the evidence, or to state the facts in detail. The preaching and publishing are both abundantly proved.

Then what is the duty of the Court? It cannot refuse its authority to carry into effect the statutes of the land. It might proceed immediately, as suggested by the King's Advocate, after the persisting in those doctrines which we have heard this day, to pronounce the sentence of the law. But the Court is disposed to

act with the greatest indulgence to the party, and will now content itself with admonishing him, though not encouraged to expect any effect from this admonition, to appear the next Court day to revoke his errors, with an intimation that if he does not obey this admonition, the Court will feel itself under the necessity of proceeding to inflict the particular penalty which the statute directs.

On the next Court day, Mr. Stone tendered a paper[1] which he described, on being interrogated as to its contents by the Court, as a revocation of his errors; but the Judge declared, after some observations by Mr. Stone, that he could not so consider it, and proceeded to the following effect:—

"The only question which I have now to determine is, whether Mr. Stone has, by his declarations this day, either verbally or in writing, satisfied the assignation made upon him—to revoke his error? It is not in my power to accept the written paper as a revocation: it is not really so intended; it would be a want of good faith to the public, and of private integrity, if I were to declare that paper to be a revocation which is directly the reverse. There is no difficulty in framing what the statute requires, as it is plainly an assurance that the party who has offended against the statute, revokes his error. Of what has fallen from Mr. Stone verbally, it is not necessary for me to take any notice. He has been heard by all around; and I might leave it to the judgment of those persons, whether what he has now declared is not of the same tenor with what he said on the last Court day? In my judgment it is clearly so. I am very certain that the indulgence of another week would be productive of no alteration in his sentiments. It is only a total abandonment of his errors that can satisfy the law. He declares that he was not sensible that by preaching his sermon before the Archdeacon he was offending against the statute of Elizabeth. With all respect to the personal veracity of Mr. Stone, I find great difficulty in reconciling my mind to the truth of that state-

[1] I, Francis Stone, Rector of Cold Norton, in the county of Essex, do declare, that I was not aware that, by preaching my Sermon before the Archdeacon, I was offending against an Act of Parliament passed in the reign of Queen Elizabeth: and further, I was persuaded that my solemn engagements with the Bishop, at my Ordination as Priest, authorized me to preach as I did. But as the Act of Parliament affirms, that I should preach only what is consistent with the Thirty-nine Articles, I do promise not to offend again in like manner.

(Signed) FRANCIS STONE.

ment. It does appear to me very extraordinary, that a gentleman, liberally educated, who has been forty years in holy orders, should be so ignorant of the fundamental law of the Church of England, as not to know the provisions of that statute. But, ignorance of the law is no defence whatever. It is not that which can be pleaded by an individual in defence of any violation of the laws of the land. The second clause of this paper is, that he was well persuaded that the ordaining Bishop authorized him to preach as he did. It appears to me, that this is an affirmance of his doctrines. When he says, that his solemn engagements authorize him to preach those doctrines, that is so far from a retractation, that it is tantamount to a declaration, that the doctrines for which he is proceeded against are agreeable to his notions of Christian faith.

"The concluding part is, 'I do promise and engage not to offend again in like manner.' Who can say otherwise, than that this is a mere promise of future silence, but no revocation of past error? It is no revocation; and that is the demand of the statute. It might be satisfied if mere future silence was all that is required, but it is no revocation of the past.

"I am, therefore, under the painful necessity of considering Mr. Stone as having declined to revoke his error, and to comply with the requisition of the statute, and I must direct the Registrar to record that the party has not revoked his error. It is only necessary to observe further that, by the Canons of the Church[1] it is prescribed, that when sentence of deprivation is to be passed, which I must declare to have been incurred by this offence, it must be pronounced by the Bishop."

The Bishop of London was then introduced, attended by the Dean of St. Paul's, and two of the Prebendaries; when, having taken the Judge's chair, he was informed by the Judge of the nature of the offence, and the proceedings instituted against Mr. Stone. The Bishop then stated that he had read the depositions and was clearly satisfied that the offence was proved, and proceeded to read and sign the sentence of deprivation, which the Judge directed the Registrar to record.

Affirmed by the Court of Arches upon Appeal, 24th April, 1809.

[1] Can. 122.

BREEKS *v.* WOOLFREY.

1838.

[THE following case is frequently referred to in proceedings before the Ecclesiastical Courts. It is reported in the first volume of Curteis' Reports.]

Mrs. Woolfrey, a Roman Catholic, erected a tombstone in the churchyard of Carisbrooke, in the Isle of Wight, to her deceased husband, bearing the following inscriptions :—"Spes mea Christus;" "Pray for the soul of J. Woolfrey;" and "It is a holy and wholesome thought to pray for the dead.—2 Mac. xii. 46." "J. W. obiit 5 die Jan. 1838, æt. 50."

The Rev. J. Breeks, vicar of Carisbrooke, brought in articles against Mrs. Woolfrey, which declared the inscription to be contrary to the Twenty-second Article of Religion, and generally to the doctrine and discipline of the Church of England, and the Articles, Canons, and Constitutions thereof; and prayed that Mrs. Woolfrey might be compelled to remove the stone.

The articles also stated that the tombstone had been erected without leave of the Incumbent, and without a faculty; but as the fact was not mentioned in the citation addressed to Mrs. Woolfrey, little stress was laid upon it in the arguments of Counsel; and this part of the articles was dismissed in a few sentences in the Judgment.

The case came before the Court of Arches, by Letters of Request from the Bishop of Winchester. It was argued on Nov. 19th, 1838, and the Judgment of Sir H. Jenner was given on Dec. 12, 1838.

Sir H Jenner, in delivering Judgment, stated briefly the facts of the case, and recited the words of the Twenty-second Article of Religion, "That the Romish doctrine concerning purgatory, pardons, and other things therein mentioned, is a fond thing vainly invented, and grounded on no warranty of Scripture, but rather repugnant to the word of God." He continued :—

"The law, then, principally relied on is the Twenty-second Article, although there is a general reference to the other Articles, Canons, and Constitutions of the Church; and it is competent to the Promoter to refer to the other Articles; and reference was made in the argument to the Thirty-fifth Article on the Homilies, the first book of which was published in the reign of Edward VI. and the second in that of Elizabeth; and particular reference was made to the seventh Homily, 'On Prayer.'

"In the argument in support of the articles it was argued, that the Twenty-second Article, in declaring that the Romish doctrine of purgatory is repugnant to the word of God, did, in effect, declare that the offering of prayers for the dead was also opposed to the Word of God, as constituting part of the doctrine of purgatory; for that the two were so intimately blended together, that it was impossible to separate the one from the other; consequently, that an inscription inviting passers-by to pray for the soul of the deceased, and containing the passage from Maccabees, was an illegal inscription.

"The point, then, upon which the whole question turns is, Whether praying for the dead is so necessarily connected with the doctrine of purgatory as to form a part of it? It is, no doubt, true that the doctrine of purgatory includes the practice of praying for the dead; but it does not necessarily follow that the converse of the proposition is true: that is, that prayers for the dead necessarily constitute a part of the doctrine of purgatory, as held by the Romish Church. If that point could be made out, there would be an end of the case, and the Court would be bound to monish the party to remove the stone, and to punish her with ecclesiastical censure and with costs. This was the point to which the Counsel directed their arguments, and many authorities were cited, to some of which the Court will presently advert.

"The Counsel very properly abstained from entering into the theological part of the question; and it would not be proper for the Court to take upon itself the duty of inquiring whether the doctrine of purgatory, as received by the Romish Church, is or is not supported by any warranty of Scripture. The law, that is, the Twenty-second Article, has expressly stated, that the doctrine is 'grounded upon no warranty of Scripture, but is rather repugnant to the word of God,' and by this law I am bound to govern myself.

The question, then, shortly, is this:—Is praying for the dead in-

volved in the doctrine of purgatory? Now, with a view of deciding that question, the first thing to determine is, What is the doctrine of purgatory as received in the Romish Church? This may be best ascertained by a reference to the decrees of the General Councils, and to authors who have written on the subject. As far as I have been able to learn, it does not appear that there was any declaration of the doctrine of purgatory by any General Council, until that of Florence, in 1438, which contained the first allusion to the doctrine. This was followed up by a decree of the Council of Trent, in 1553, which was a year after the Articles of Religion were set forth, by Royal authority, in this country.

"When I state that no mention was made of the doctrine of purgatory in any General Council previous to that of Florence, I do not mean to say that the doctrine was not received at an earlier period; it would appear, according to the best authorities to which the Court had access, that the notion of purgatory was first introduced about the fifth or sixth century. Bishop Tomline, in the second volume of his 'Elements of Christian Theology,' states, that 'the practice of praying for the dead began in the third century, but that it was not till long afterwards that purgatory was ever mentioned among Christians. It was at first doubtfully received, and was not fully established until the papacy of Gregory the Great, in the beginning of the seventh century.' The doctrine then so introduced, and which is declared by the Twenty-second Article of our Church to be repugnant to the word of God, is thus described in the Catechism of Trent:—'*Est purgatorius ignis, quo piorum animæ ad definitum tempus cruciatæ expiantur, ut eis in æternam patriam ingressus patere possit, in quam nihil coinquinatum ingreditur.*' It was also a part of that doctrine that the pains of purgatory may be alleviated or shortened by the prayers of the living, by masses and thanksgivings. This doctrine being declared by the Church of England to be without warranty of Scripture, the question is, Whether prayer for the dead falls under the same condemnation? Now, the first argument that suggests itself against this supposition is, that prayer for the dead is a practice of much earlier date than the introduction of the doctrine of purgatory."

The Judge then cited the authority of Jeremy Taylor and Archbishop Usher, to show that prayer for the dead had been used by Epiphanius, Cyril, and others of the Fathers, not in connexion with

the Romish idea of purgatory, but "that the soul might have rest and quiet in the interval between death and resurrection."

He continued as follows :—

"But it was said that, whatever might have been the case in the early ages with respect to the practice of praying for the dead, the Church of England had taken a different view of the subject; and, with reference to what had taken place in the earliest time of the Reformation, and subsequently, that though prayers for the dead were not considered, in the first instance, contrary to the principles of the Christian religion, yet that in later times they had been considered as opposed to the principles and doctrines of the Church, as had been shown by the alterations made at different times in its Liturgy. In the Primer of Henry VIII. in the Burial and Communion Services, such prayers were used, and in the Formula of Faith in the time of Henry VIII. prayers for the dead were enjoined as 'a pious and proper work.' In the first Prayer-book also of Edward VI. prepared by persons of great eminence and learning, called together by the King to consider the alterations necessary to be made in the public service of the Church, in consequence of the progress of the Reformation of the established religion, such prayers were retained. It is not immaterial to see the manner in which this Prayer-book had been compiled, and I cannot refer to more satisfactory authority than the Act of Parliament by which the book was established, namely, 2 & 3 Edward VI. c. 1, which is entitled, 'An Act for Uniformity of Service and Administration of the Sacraments throughout the Realm,' in the preamble of which it is stated, that, 'with the intent that a uniform, quiet, and godly order should be had, his Highness had appointed the Archbishop of Canterbury, and certain of the most learned and discreet bishops and other learned men of the realm, to consider and ponder the premises, and thereupon, having as well eye and respect to the most sincere and pure Christian religion taught by the Scripture, as to the usages in the primitive Church, should draw and make one convenient and meet order, rite, and fashion of common and open prayer and administration of the sacraments to be had and used in his Majesty's realm of England and Wales;' and with reference to these principles the first Prayer-book of Edward VI. was drawn up, and in this book prayers for the dead were inserted, although in some degree different from those in the Primer of Henry VIII.

Such prayers, therefore, were not considered by those learned persons as connected with the Romish doctrine of purgatory; but the second Prayer-book of Edward VI. was afterwards drawn up, in which these prayers were omitted, and it was argued, that they were inconsistent with the doctrine of the Church as then established, and various authors were referred to to show that they were omitted on that account; and several writers do take that view of the subject. But it is agreed that there is no express prohibition of such prayers; it must, therefore, be shown that they were prohibited by necessary implication. It appears, however, from writers and historians, that these alterations in the Liturgy in the second Prayer-book of Edward VI. were acceded to principally at the instance of Calvin and Bucer, though on what grounds precisely I have not been able to learn. But there was one authority at least to show that it was not because, in the opinion of the majority of the persons employed in its revision, they were inconsistent with the doctrines of the Church of England. The Act of Parliament by which the second Prayer-book of Edward VI. was established—5 & 6 Edward VI. c. 1, also entitled 'An Act for the Uniformity of Service and Administration of Sacraments throughout the Realm,'—in its recital, which must be taken to express the sentiments of the majority of the Legislature, states: 'Where (whereas) there has been a very godly order set forth by the authority of Parliament for common prayer and administration of the sacraments, to be used in the mother tongue within the Church of England, agreeably to the word of God and the primitive church,' adopting the words of the former Act, which enjoined 'a regard to the religion taught by Scripture, and to the usages in the primitive church;' 'very comfortable to all good people desiring to live in Christian conversation, and most profitable to the estate of this realm, upon the which the mercy, favour, and blessing of Almighty God are in nowise so readily and plenteously poured as by common prayers, due using of the sacraments, and often preaching of the Gospel with the devotion of the hearers;' and it goes on to state, that 'yet notwithstanding a great number of people do wilfully abstain and refuse to come to their parish churches, and other places where common prayer, the administration of the sacraments, and preaching of the word of God is used;' and in the fifth section it sets forth, 'and because there hath arisen in the use and exercise of the aforesaid common service

in the church heretofore set forth divers doubts for the fashion and manner of the ministration of the same, rather by the curiosity of the ministers and mistakers than of any other worthy cause; therefore, as well for the more plain and manifest explanation thereof, as for the more perfection of the said order of common service, in some places where it is necessary to make the same prayers and fashion of service more earnest and fit to stir Christian people to the true honouring of Almighty God;' and it goes on to set forth that the King and Parliament had caused the Book of Common Prayer 'to be faithfully and godly perused, explained, and made fully perfect.' This Act was repealed by the 1 Mary, which was itself repealed by 1 Elizabeth, c. 2, which restored 5 & 6 Edward VI. Now, up to this period of time, it seems that at least there was not any express prohibition of prayers for the dead, nor any notion that they implied a necessary belief in the doctrine of purgatory, though, in consequence of professors of the Romish religion taking advantage of the practice as an argument to support their own doctrine of purgatory, it was thought proper that the form of prayer should be altered, and those prayers omitted in the public service of the Church as not being enjoined (which is admitted) or sanctioned by any warranty of Scripture.

"The authorities seem to go no further than this—to show that the Church discouraged prayers for the dead, but did not prohibit them; and that the Twenty-second Article is not violated by the use of such prayers."

The learned Judge then quoted Mr. Palmer's "Origines Liturgicæ," as giving the probable reason for the disapproval of the practice of prayers for the dead—namely, "that they might be abused to the prejudice of the uneducated classes, and to the support of the Roman Catholic doctrine."

After showing that the Homilies contained the same disapproval of the practice, but no positive prohibition of it, the Judge alluded to the fact that the quotation placed on the tombstone from the Book of Maccabees was taken from the Roman Catholic version; but considered that this was not material. He also referred to the inscription placed upon the tomb of Bishop Barrow, in the Cathedral of St. Asaph, 1680: "O vos transeuntes in domum Domini, in domum orationis, orate pro conservo vestro, ut inveniat misericordiam in die Domini."

The judgment concludes as follows: "I am, then, of opinion, on the whole of the case, that the offence imputed by the articles has not been sustained; that no authority or Canon has been pointed out by which the practice of praying for the dead has been expressly prohibited; and I am accordingly of opinion, that, if the articles were proved, the facts would not subject the party to ecclesiastical censure, as far as regards the illegality of the inscription on the tombstone."

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